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Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF NEVADA,
CARSON-TRUCKEE WATER CONSERVANCY DISTRICT
and SIERRA PACIFIC POWER COMPANY, a corporation,
Petitioners,

v.

WILLIAM P. CLARK, Secretary of the Interior, *et al.*,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 83-1549, 83-1562, 83-1603 and 83-1714.

CARSON-TRUCKEE WATER CONSERVANCY DISTRICT, SIERRA PACIFIC POWER COMPANY, and THE STATE OF NEVADA,
Plaintiffs-Appellanis, Cross-Appellees,

v.

WILLIAM P. CLARK, SECRETARY OF THE INTERIOR, *et al.*,
Defendants-Appellees,

and

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Defendant-Intervenor-Appellee, Cross-Appellant.

Argued and Submitted Dec. 15, 1983

Decided Aug. 22, 1984

An Appeal from the United States District Court for the District of Nevada.

Before DUNIWAY, Senior Circuit Judge, PREGERSON, and NORRIS, Circuit Judges.

PREGERSON, Circuit Judge:

The Carson-Truckee Water Conservancy District and Sierra Pacific Power Company (appellants) sought a declaratory judgment that the Secretary of the Interior (Secretary) violated the Washoe Project Act, 43 U.S.C.A. §§ 614-614d (West 1964), and related reclamation laws in refusing to sell water from the Stampede Dam and Reservoir on the Little Truckee River for municipal and industrial (M&I) use in Reno and Sparks. In addition, Nevada sought a determination that the Secretary was required to obtain a permit from the Nevada State Engineer to operate the Stampede Dam in California. The Pyramid Lake Paiute Tribe of Indians (Tribe) intervened in support of the Secretary. We affirm in part and vacate in part.

I. *Factual Background and District Court Decisions*

A detailed recitation of the relevant facts may be found in the district court's two opinions. *Carson-Truckee Water Conservancy District v. Watt* (*Carson-Truckee I*), 537 F. Supp. 106 (D. Nev. 1982); *Carson-Truckee Water Conservancy District v. Watt* (*Carson-Truckee II*), 549 F. Supp. 704 (D. Nev. 1982). The Little Truckee River flows into the Truckee River, which then flows from California into Nevada and into Pyramid Lake. Stampede Dam is located on the Little Truckee in California. The Secretary now operates Stampede Dam in a way that conserves two species of fish, the cui-ui fish and Lahontan cutthroat trout, that are protected under the Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1543 (1982). *See Carson-Truckee I*, 537 F. Supp. at 109; *Carson Truckee II*, 549 F. Supp. at 710-11. Appellants concede that the Secretary's obligations under ESA supersede his obligations under the Washoe Project Act and related federal reclamation laws. *Carson-Truckee II*, 549 F. Supp. at 708. Appellants, however, challenge the extent of the Secretary's obligations under ESA.

The district court bifurcated the issues. In *Carson-Truckee I*, the district court held that (1) plaintiffs have standing to challenge the Secretary's operation of the dam, (2) plaintiffs have a private right of action to enforce the Secretary's obligations under the Washoe Project Act, (3) M&I use is a "beneficial purpose" for which the Secretary is authorized to sell the project's water under the Washoe Project Act, 43 U.S.C.A. § 614, (4) the Secretary is required to sell water from Stampede Dam not needed to fulfill his trust obligations to the Tribe and his obligations under ESA, and (5) the Secretary does not need a Nevada state water permit for Stampede Dam's present operation in California.

After deciding *Carson-Truckee I*, the district court received evidence on the question of how much water was required to fulfill the Secretary's obligations under ESA and on an alternate plan, submitted by appellants to the Secretary, for operation of the dam. The parties submitted direct evidence in the form of written expert testimony. The parties then were afforded the opportunity to fully cross-examine the experts.

After the hearing, the district court, in *Carson-Truckee II*, ruled that (1) ESA required the Secretary to give priority to conserving the cui-ui fish and Lahontan cutthroat trout so long as they were endangered and threatened, and (2) the Secretary's finding that there was no excess water to sell after fulfilling those statutory obligations was supported by substantial evidence and therefore his operation of Stampede Dam was neither arbitrary nor capricious. The court also found that appellants' proposed alternate plan for the operation of the dam would jeopardize the fish and that the Secretary did not abuse his discretion in rejecting the plan.

II. *Analysis*

We affirm and adopt all but one of the district court's holdings for the reasons ably stated by Judge Solomon

in his two learned opinions. The one holding we vacate is the court's ruling in *Carson-Truckee I* that the Washoe Project Act obligates the Secretary to sell all water from Stampede Dam that remains after he has fulfilled his obligations under ESA and under the Tribe's reserved water rights.[1] *Carson-Truckee I*, 537 F. Supp. at 112-13. The following analysis assumes a familiarity with the district court's opinions.

(a) *Obligation to sell water*

We agree with the district court's conclusion that M&I use is a "beneficial purpose" for which the Secretary is authorized to sell the project's water, *Carson-Truckee I*, 537 F. Supp. at 112. We do not necessarily agree, however, that the Secretary is obligated to sell the water for M&I purposes simply because those purposes are the only present uses for which the Secretary can obtain some reimbursement for project costs.

Reclamation projects funded by the federal government are generally intended to be reimbursed through the sale of project water. *See, e.g.*, 43 U.S.C. § 485h(a) (1982) (Secretary must submit findings on the amount of costs that will "probably be repaid by water users" before construction expenditures for a given project may be made). The district court held that Congress had anticipated that the Washoe Project would be 86% reimbursable. *Carson-Truckee I*, 537 F. Supp. at 111. But circumstances have changed. Although Congress in passing the Washoe Project Act intended that irrigation was the Act's primary purpose, irrigation is no longer a viable use of the project. Appellants are the only entities that seek to distribute the water for reimbursable purposes. Thus, they argue that the Secretary must sell the project's water to them.

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[1] We do not consider the Secretary's obligation to provide water to the Tribe for the reasons given by the district court in *Carson-Truckee II*, 549 F. Supp. at 712-13.

The Washoe Project Act, however, unlike other reclamation project authorizations, did not prohibit the Secretary from constructing the project until repayment contracts for the project had been entered into. *Compare* San Angelo Project Act § 2(b), 43 U.S.C.A. § 615p(b) (West 1964) (Secretary must enter into contracts for repayment of project costs before constructing project) with Washoe Project Act § 2(b)-(c), 42 U.S.C.A. § 614a (b)-(c) (Secretary must enter into repayment contracts before delivering water). The Washoe Project Act merely prohibits the Secretary from delivering project water for reimbursable uses without first obtaining a repayment contract. *See* Washoe Project Act § 2(a), 43 U.S.C.A. § 614a(a) (federal reclamation laws govern Secretary's construction, operation, and maintenance of Washoe project); 43 U.S.C. 485h(c) (1982) (section of federal reclamation law governing sale of reclamation project water for M&I use).

Because we affirm the district court's holding that, under ESA, the Secretary is permitted to use at this time all of the project's water to conserve the two species of fish, we need not resolve the extent of the Secretary's obligation to obtain reimbursement for the project in the future. The Secretary's asserted obligation to sell project water for M&I purposes should be considered when his superseding obligations to the Tribe, *see supra* note 1, and under ESA have been fulfilled. Accordingly, we vacate the district court's opinion on this narrow point.

(b) *Appellants' arguments*

We feel constrained to elaborate our reasons for rejecting appellants' arguments against two of the district court's holdings. Those holdings are that (1) ESA requires the Secretary to give priority to the conservation of threatened and endangered species, and (2) the Secretary did not abuse his discretion both in determining that there was no excess water to sell for M&I purposes

after his obligations under ESA were fulfilled, and in rejecting appellants' alternate plan for operating Stampede Dam. Our comments address specific arguments raised on appeal. We make them only to supplement the district court's reasoning.

(1) *ESA's requirements.*

Appellants urge a reading of ESA that would lead to a result at odds with the statute's clearly stated objectives. Appellants contend that the Secretary's authority is defined solely by ESA § 7(a)(2), 16 U.S.C. § 1536 (a)(2).[2] Thus, they argue that the Secretary is authorized only to take actions that avoid "jeopardizing" the continued existence of a species. Appellants contend that the Secretary may not do more than that.

In addition to its § 7(a)(2) "jeopardy" provision, however, ESA also directs the Secretary to conserve threatened and endangered species to the extent that they are no longer threatened or endangered. Appellants, relying *solely* on § 7(a)(2), would have us ignore the other sections of ESA directly applicable here and relied on by the district court. *Carson-Truckee II*, 549 F. Supp. at 708-10. ESA § 2(b), (c), & § 3(3), 16 U.S.C. § 1531(b), (c), & § 1532(3).[3] ESA § 7(a)(1), moreover, specifically

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[2] Section 7(a)(2) states in pertinent part:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical . . . .

16 U.S.C. § 1536(a)(2) (1982).

[3] Section 2(b) states the purposes of ESA:

> The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a

directs that the Secretary "shall" use programs administered by him to further the conservation purposes of ESA. 16 U.S.C. § 1536(a)(1).[4] Those sections, as the district court found, direct that the Secretary actively pursue a species conservation policy. *See also Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184, 98 S.Ct. 2279, 2297, 57 L.Ed.2d 117 (1978) (ESA requires the Secretary to give highest priority to the preservation of endangered species; Congress intended to "halt *and reverse* the trend toward species extinction, whatever the cost." (emphasis added)).

The purpose of ESA § 7(a)(2) is to ensure that the federal government does not undertake actions, such as building a dam or highway, that incidentally jeopardize

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program for the conservation of such endangered species and threatened species . . . .

16 U.S.C. § 1531(b).

Section 2(c) states in pertinent part:

[A]ll Federal departments and agencies shall seek to conserve endangered species and threatend species and shall utilize their authorities in furtherance of the purposes of this chapter.

16 U.S.C. § 1531(c).

Section 3(3) defines "conserve":

The terms "conserve", "conserving", and "conservation" mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary.

16 U.S.C. § 1523(3).

[4] Section 7(a)(1) states in pertinent part:

The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species . . . .

16 U.S.C. § 1536(a)(1).

the existence of endangered or threatened species. See *TVA v. Hill*, 437 U.S. 153, 98 S.Ct. 2279, 57 L.Ed.2d 117 for an example of § 7(a)(2)'s application. Contrary to appellants' contention, ESA § 7(a)(2) is inapplicable here because the Secretary has not undertaken a project that threatens an endangered species. Instead, following the mandate of ESA § 7(a)(1), § 2(b), (c), & § 3(3), 16 U.S.C. § 1536(a)(1), § 1531(c), (b), & § 1532(3), the Secretary actively seeks to conserve endangered species. Thus, the district court properly applied ESA § 2(b), (c), & § 3(3) rather than ESA § 7(a)(2) to this case.

Applying the proper code sections to this case, the Secretary's decision is well-justified. The Washoe Project Act anticipates but does not require the Secretary to sell water to recover project construction costs. *See supra* pp. 4-6. ESA, on the other hand, directs the Secretary to use programs under his control for conservation purposes where threatened or endangered species are involved. Following this directive, the Secretary here decided to conserve the fish and not to sell the project's water. Given these circumstances, the ESA supports the Secretary's decision to give priority to the fish until such time as they no longer need ESA's protection.[8]

(2) *Abuse of Discretion.*

In addition to challenging the extent of the Secretary's obligations under ESA, appellants presented the Secretary with a proposed alternate plan under which they

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[8] Because we hold that the Washoe Project Act does not require the Secretary to sell water for M&I use, we need not reach the question whether, given competing mandatory statutory directives, the Secretary would be required to use the project's water entirely for conservation purposes under ESA § 2(b), (c), § 3(3), & § 7(a)(1). Similarly, because the Secretary actively seeks to use the project for conservation purposes, we need not consider the extent of his affirmative obligations under ESA § 2(b), (c), § 3(3), & § 7(a)(1) had he decided neither to sell the water nor to protect the fish.

maintained he could both conserve the fish and sell water for M&I use. The plan included planting miles of shade trees along the river to reduce water temperature, confining the river to a single channel, and constructing fish hatcheries. The district court found that appellants' proposed alternate plan would jeopardize the fish. He then held that the Secretary had not abused his discretion in rejecting the plan and in determining that he had no excess water to sell for M&I purposes after fulfilling his obligations under ESA. The district court's holding is based in part upon findings of fact about the spawning requirements of the cui-ui fish and Lahontan cutthroat trout. *Carson-Truckee II*, 549 F. Supp. at 711.

Appellants raise two objections to the district court's holding. First, appellants contend that, although a district court's factual determinations are usually reviewed under a clearly erroneous standard, the nature of the hearing conducted by the district court in this case warrants a less deferential standard of review. Appellants assert that the hearing before the district court was a "paper hearing," in which the demeanor and credibility of the expert witnesses was not involved. Second, they maintain that the district court was clearly erroneous in any event because its decision, which affirmed the Secretary's rejection of appellants' proposed plan, was based on a finding that appellants' plan would result in a constant river temperature of 68 degrees. The fish cannot reproduce in water that warm.

Neither argument persuades us to reach a different result. Although the district court required that expert testimony be submitted in writing, the experts were cross-examined in the court's presence. And, even if we were to employ a less deferential standard of review, we nonetheless would affirm the district court on its overall holding that the Secretary did not abuse his discretion.

The 68 degree finding is found in a brief footnote in the district court's opinion. *Carson-Truckee II*, 549 F. Supp. at 711 n.9. The district court's holding does not stand or fall with that finding. Even assuming that the district court's 68 degree finding was clearly erroneous,[6] we think the district court's other findings—for example, that (1) appellants did not meet their burden of showing that the Secretary abused his discretion, (2) it is not feasible to operate Stampede Dam for both M&I and fishery purposes, and (3) appellants' plan would require the expenditure of huge sums, thereby defeating the purpose of obtaining reimbursement, *Carson-Truckee II*, 549 F. Supp. at 711-12—amply support the court's approval of the Secretary's action.

The judgment is AFFIRMED in part and VACATED in part.

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[6] The court noted that the appellants' plan would result in a constant river temperature of 68 degrees. Such a temperature renders it too hot for the fish to reproduce successfully. Appellants point out that the evidence introduced before the district court indicated that appellants' plan—planting miles of shade trees, dredging the channel, and undertaking other measures—would result in occasional, not constant, 68 degree river temperatures. The district court may therefore have erroneously reported appellees' expert's testimony.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civil No. R-76-152-HEC

CARSON-TRUCKEE WATER CONSERVANCY DISTRICT, SIERRA PACIFIC POWER COMPANY, a corporation, and STATE OF NEVADA,

Plaintiffs,

vs.

CECIL D. ANDRUS, Secretary of the Interior, *et al.*,

Defendants,

and

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,

Defendant-Intervenor.

[Entered Aug. 27, 1979]

MEMORANDUM DECISION

This law suit arises out of a dispute involving the Little Truckee River, a tributary of the Truckee River, which flows from the State of California to the State of Nevada downstream through the Stampede Dam and Reservoir.

On October 1, 1976, the Carson-Truckee Water Conservancy District (hereinafter, the "District"), Sierra Pacific Power Company and the State of Nevada filed their first amended complaint for mandamus and injunctive and declaratory relief. Six causes of action are set forth, all of which relate to the operation of the Stampede Dam and Reservoir by the Federal Defendants. The first, second, and sixth causes of action are predicated on the Washoe Project Act, 43 U.S.C. §§ 614-614d, the Federal Reclamation Laws, 43 U.S.C. §§ 371 et seq., and the Water Supply Act of 1958, 43 U.S.C. §§ 390b et seq. The

third, fourth, and fifth causes of action are based on the laws of the States of California and Nevada.

The Plaintiffs have submitted a motion for summary judgment on the sixth cause of action. The Defendants have moved for summary judgment on all claims.

Findings of Fact

The Stampede Dam and Reservoir is part of the Washoe Reclamation Project. Congress authorized the Project on August 1, 1956. Pub.L.No. 84-858, 70 Stat. 775 (codified at 43 U.S.C. §§ 614-614d (1956)). On August 21, 1958, Congress amended the Act to authorize increased construction costs and to add Prosser Creek Dam and Reservoir to the Project. Pub.L.No. 85-706, 72 Stat. 705 (codified at 43 U.S.C. § 614d (1958)).

The Carson-Truckee Water Conservancy District was formed January 27, 1958 under Nevada law to act as a contracting entity to purchase the water stored by the Project. The District is an organization within the definition of 43 U.S.C. § 485a(g), and has the capacity to levy assessments upon all taxable real property located within its boundaries.

The Project consists of two divisions: the Stampede Division and the Watasheamu Division. The Stampede Division is located in the Truckee River Basin and it includes Stampede Dam, Prosser Creek Dam, Marble Bluff Dam and Fishway, and several smaller facilities. The Stampede Dam is located on the Little Truckee River approximately ten miles above the Truckee River junction and immediately west of the Nevada border.

On February 19, 1965, prior to the construction of the Stampede Dam, the District and the United States entered into a contract. In return for the delivery of water, the United States would be repaid a substantial portion of the construction, operation, and maintenance costs of the Project. The agreement also provided that it would not

be effective until the parties agreed to a supplemental contract regarding allocation of costs for the repayment of the Stampede Division.

In August of 1966 the Bureau of Reclamation was in a position to proceed with the construction of Stampede Dam. Two developments, however, threatened to delay the building of the dam. First, it appeared that an existing contract between the United States and the Truckee-Carson Irrigation District would have to be revised.[1] Second, on July 14, 1966, the Commissioner of the Bureau of Indian Affairs informed the Secretary that adequate safeguards were not being used to protect the Pyramid Lake Indians' interest in preserving the lake and its fishery. The Commissioner pointed out that the tribe had withdrawn an initial objection to the Washoe Project because of Department of Interior assurances that some 215,000 acre feet of water would enter the lake when the project became operational. In July of 1966 it was apparent that hydrologic studies could not support the Department's 215,000 acre feet estimate.

Taking into consideration the need to provide adequate flood control protection to both Boca Dam and the Reno/Sparks area, the Commissioner of Reclamation, on Au-

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[1] In 1926 the United States and the Truckee-Carson Irrigation District executed a contract which provided that certain lands in the Truckee and Carson Divisions of the Newlands Project would have a prior right to the use of the waters in the Truckee and Carson Rivers. Until the priority had been satisfied, the United States could not divert or impound waters from these streams for use upon other lands. Therefore, during the time that negotiations for the Stampede amendment to the Washoe Project contract were under way, the United States was also negotiating with the Truckee-Carson Irrigation District seeking a reduction in the District's prior rights to the use of the Truckee and Carson rivers for 87,500 acres of land in the Truckee and Carson divisions of the Newlands Project. The agreement between the United States and the Truckee-Carson Irrigation District required Congressional ratification. By August of 1966 it was apparent that the required approval would not be obtained that year.

gust 8, 1966, recommended to the Secretary of Interior that construction of the Stampede project should commence without the execution of a repayment contract with the Carson-Truckee Water Conservancy District. The Secretary concurred and on August 24, 1966 directed an immediate start for construction. Construction began shortly thereafter.

As the dam neared completion, the District inquired as to the status of the supplemental repayment contract. In response, the Secretary of Interior advised the District that because of the unsettled nature of water right problems in the Truckee and Carson River Basins, the United States was unable at that time to supply municipal and industrial water from Stampede Dam and Reservoir. Until the water rights issues were resolved, the Secretary directed that the dam and reservoir be utilized for flood control, fish and wildlife benefits, and recreation. In the meantime, the Secretary suggested the possibility of negotiating some type of agreement concerning the interim operation of the Stampede Reservoir to produce additional project benefits for the area.

Stampede Dam and Reservoir was completed in 1970. The water from the dam and reservoir has been used solely for non-reimbursable purposes, primarily for the benefit of the Pyramid Lake Fishery.

In 1967 the Secretary of Interior declared the cui-ui fish population of Pyramid Lake an endangered species. 32 Fed.Reg. 4001 (1967). The Lahontan cutthroat trout, originally listed as endangered, was classified as threatened with extinction in 1975. 40 Fed.Reg. 29863 (1975). With regard to the latter species, the Secretary determined that its threatened status was due to the modification of its habitat. In particular he stated:

> ". . . This fish formerly occupied most streams of the Truckee, Carson, and Walker River drainages in western Nevada and east central California. Today

> it occupies much of the same area but is less abundant in the headwaters than it formerly was. Water diversions within its native range continue to be a threat to this species. This problem is especially evident in Pyramid Lake where the diversion of water from the Truckee River has resulted in a lowering of the water level in the lake. The lower water-levels in the lake and the siltation of the mouth of the Truckee River (at its entry into the lake) due to lack of flow has eliminated much of the spawning run of the species in this area.".

40 Fed.Reg. 29864 (1975).

In 1977 in *United States v. Truckee-Carson Irrigation District, et al.*, No. R-2987-JBA (D. Nev. 1977), the United States District Court for the District of Nevada rejected the United States' claim seeking the establishment of a *Winters* reserved water right for the Pyramid Lake Paiute Tribe of Indians for fishery purposes.

Conclusions of Law

First, Second and Sixth Causes of Action

The Plaintiffs in the sixth cause of action seek a declaratory judgment that the Secretary of Interior is obligated both to preserve, store, and supply water in Stampede Dam and Reservoir for municipal and industrial purposes and to enter into a water supply and cost reimbursement contract with the Carson-Truckee Water Conservancy District.

The cross-motions for summary judgment on this cause of action raise the following two issues: (1) whether the provisions of the Washoe Project Act compel the Secretary to enter into a cost reimbursement contract with the Carson-Truckee Water Conservancy District, and if so (2) whether the provisions of the Endangered Species of 1973, Pub.L.No. 93-205, 87 Stat. 884 (codified at 16 U.S.C. § 1531 et seq.), somehow alter that obligation.

The express statutory language of the Washoe Project Act delineates the obligations owed by the Secretary of the Interior to the District. The pertinent provision, § 614a(c) provides:

> ". . . Notwithstanding any other provision of law to the contrary, all net revenues derived from the sale of commercial power from the Washoe reclamation project shall be applied, first, to the amortization of that portion of the cost of constructing the project which is allocated to commercial power with interest on the unamortized balance thereof at the average rate (which rate shall be certified by the Secretary of the Treasury) paid by the United States on its marketable long-term securities outstanding on August 1, 1956, and thereafter to the amortization of that portion of the cost of constructing the project which is allocated to irrigation but which is beyond the ability of the contracting irrigation organizations to repay as provided above, including interest that would have been paid by the irrigators on that portion of the irrigation allocation attributable to furnishing irrigation benefits to excess lands which is not repaid under subsection (b) of this section: *Provided,* That the Secretary, prior to the delivery of project water supplies, shall have entered into a contract or contracts with an organization or organizations as defined in section 485a(g) of this title which have the capacity to levy assessments upon all taxable real property located within their boundaries to assist in making repayments."

Although the literal meaning of the last sentence indicates that the Secretary is compelled to contract with the District before any water is diverted from the dam, the provision is somewhat ambiguous. The bill which the House of Representatives initially approved did not contain the last sentence while the Senate bill did. Resolution of this difference, as well as other variations between

the House and Senate bills, was the subject of a Conference Committee. 102 CONG.REC. 13825-26 (1956). The members of that committee agreed to recommend to their respective houses a bill which included the last sentence. The House conferees stated in the last two sentences of the Conference Report:

> "That part of the cost attributable to serving supplemental water to excess lands which the Secretary determines to be in excess of the increased payment capacity of such lands would have to be repaid with interest from power revenues. It is the intention of the House conferees that the Federal taxpayers shall be made whole with respect to the cost to the Federal Government attributable to serving excess lands and that the repayment of such ocsts should come from project revenues."

102 CONG.REC. 13826 (1956).

Thereafter, Senator Bible of the State of Nevada stated that "the House conferees accepted the Senate requirement for a conservancy district to be formed in the area which would be authorized to contract for the repayment of the costs of the Washoe Project." 102 CONG.REC. 13939 (1956).

The last sentence of § 614a(c) should also be read in the context of all the legislative proceedings which are replete with expressions that the Federal Government would be reimbursed for the construction costs of the project. Excluding a $2 million allocation to fish and wildlife purposes and an approximate $8 million allotment for flood control, Congress intended that all of the projected $43,700,000 cost be reimbursable. 102 CONG.REC. 7040, 12229, 13938 (1956).

It is well established that when a statute, such as § 614a(c), is susceptible of more than one interpretation a court should construe it in the manner which effectuates the purpose of the statute. *Vermilya-Brown Co. v. Con-*

nell, 335 U.S. 377, 386, 69 S.Ct. 140, 93 L.Ed. 76 (1948), *rehearing denied*, 336 U.S. 928 (1949). While there is no discussion in the legislative history of the ambiguities contained in the last sentence of § 614a(c), it is nonetheless clear in light of the statute's background that Congress intended the imperative "shall" to compel the Secretary to execute a cost reimbursement contract with the District.[2]

Whatever duties the Secretary may have under the Washoe Project Act, the Defendants contend that section 7 of the Endangered Species Act of 1973 prohibits the Secretary from contracting with the District because of the presence of the cui-ui fish and the Lahontan cutthroat trout in Pyramid Lake. Section 7 provides:

> "The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal departments and agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such en-

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[2] The Defendants contend that the provisions of the National Environmental Policy Act of 1969, (NEPA), 42 U.S.C. § 4321 et seq., prohibit the Secretary from executing a cost reimbursement contract with the District at this time because (1) NEPA "significantly enlarged the Secretary's discretion", and (2) the Secretary must prepare an environmental impact statement before entering into a contract with the District. Without deciding whether NEPA is applicable to the facts in this case, that statute does not repeal by implication any other statute. *United States v. Scrap*, 412 U.S. 669, 694, 93 S.Ct. 2405, 37 L.Ed.2d (1973). Therefore, the requirements of NEPA do not alter the Secretary's obligations under the Washoe Project Act.

> dangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical."

16 U.S.C. § 1536.

The Supreme Court in *Tennessee Valley Authority v. Hill*, —— U.S. ——, 98 S.Ct. 2279 (1978) examined the language, history, and structure of the legislation and concluded that Congress intended that the preservation of endangered and threatened species be afforded the "highest of priorities". 98 S.Ct. at 2292. In light of this unconditional Congressional directive, the Supreme Court affirmed the issuance of an injunction enjoining the operation of the Tellico Dam due to the endangered snail darters.

In that case the Secretary, pursuant to his rulemaking authority under section 4 of the Endangered Species Act, 16 U.S.C. § 1533(a)-(d), promulgated regulations in which he stated "that the snail darter apparently lives only in that portion of the Little Tennessee River which would be completely inundated by the reservoir created as a consequence of the Tellico Dam's completion." 98 S.Ct. at 2285. Based upon those regulations, the Supreme Court found that there was an "irreconcilable conflict between operation of the Tellico Dam and the explicit provisions of § 7 of the Endangered Species Act". 98 S.Ct. at 2301.

The critical issue in the present case is whether there is an "irreconcilable conflict" between diversion of water from the Stampede Dam and Reservoir to the Reno/Sparks area and the welfare of the cui-ui fish and the Lahontan cutthroat in Pyramid Lake. The regulations do not describe the factors which have contributed to the endangered status of the cui-ui fish. With regard to the threatened Lahontan cutthroat, however, the regulations specifically state that the diversion of water from the

Truckee River has eliminated much of the spawning area in Pyramid Lake. 40 Fed. Reg. 29864 (1975). Based upon this regulation, there is an "irreconcilable conflict" between the Plaintiffs' request to compel the Secretary to execute a cost reimbursement contract and the well being of the Lahontan cutthroat trout.[3]

Since the regulation was promulgated pursuant to the Secretary's rulemaking authority, the standard of judicial review under section 706 of the Administrative Procedure Act, 5 U.S.C. § 706, as interpreted in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971), is restrictive. This Court must decide: (1) whether the Secretary acted within the scope of his authority, (2) whether the actual choice was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law", and (3) whether the Secretary followed the necessary procedural requirements. 401 U.S. at 415-417. These questions present genuine issues of material fact.

The first cause of action is substantively the same as the sixth cause of action with the sole distinguishing feature being that while the sixth requests declaratory relief, the first prays for injunctive relief. The same genuine issues of material fact which render summary adjudication of the sixth claim of relief inappropriate, therefore, preclude summary adjudication of the first.

The second cause of action alleges that under the provisions of the Washoe Project Act, the Secretary has acted

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[3] The Plaintiffs maintain that section 7 does not apply to the Stampede Dam since it was completed in 1970, three years prior to the enactment of section 7. In *TVA v. Hill*, 98 S.Ct. at 2297, n. 2, the Supreme Court gave effect to the plain meaning of section 7, namely that it affects all projects which remain to be "authorized, funded, or carried out". As the Court pointed out, the subject matter is covered by section 7 as long as the species has not been extirpated or its habitat destroyed. Neither of these two events have occurred in this case.

arbitrarily and capriciously, and has abused his discretion. In light of this Court's interpretation of 43 U.S.C. § 614a(c), the second claim for relief is superfluous.

Third, Fourth, and Fifth Causes of Action

These three causes of action are all based upon state law. Under § 614a(a) of the Washoe Project Act, Congress directed that the Stampede Dam and Reservoir be constructed and operated pursuant to the Reclamation Act of 1902. Section 8 of that act provides.

> "Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any States or Territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested rights acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to or from any interstate stream or the waters thereof."

43 U.S.C. § 383.

Under this statute a state may impose any condition on control, appropriation, condemnation, purchase, and distribution of water in a federal reclamation project that is not inconsistent with explicit Congressional directives respecting the project. *California v. United States*, —— U.S. ——, 98 S.Ct. 2985, 2996-3001 (1978). Section 7 of the Endangered Species Act is such a Congressional directive. However, as previously discussed, genuine issues of material fact preclude summary adjudication of the correctness of the Secretary's determination that the Lahontan cutthroat trout command protection under that statute. Summary judgment with respect to the third, fourth, and fifth causes of action is inappropriate at this time.

Based on the foregoing,

IT IS HEREBY ORDERED:

1. That the second cause of action is dismissed.

2. That the motions for summary judgment directed to the first, third, fourth, fifth, and sixth causes of action are denied.

DATED: Aug. 22, 1979.

/s/ [Illegible]
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
D. NEVADA

No. CV-R-76-152-GJS

CARSON-TRUCKEE WATER CONSERVANCY DISTRICT, SIERRA PACIFIC POWER COMPANY, a corporation, and STATE OF NEVADA,
Plaintiffs,
v.
JAMES G. WATT, SECRETARY OF INTERIOR, *et al.*,
Defendants,
and
PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Defendant-Intervenor.

Feb. 16, 1982

OPINION

SOLOMON, District Judge:

This action arose out of a dispute over the waters of the Truckee River, which flows from the mountains of Eastern California through Stampede Dam and Reservoir (Stampede), and through Reno, Nevada. The Truckee empties into Pyramid Lake, which is surrounded by the Pyramid Lake Paiute Indian Reservation.

Plaintiffs Carson-Truckee Water Conservancy District (District) and Sierra Pacific Power Company (Sierra Pacific) seek to appropriate water from the lower Truckee River for Municipal and Industrial (M&I) uses. Plaintiffs contend that the Secretary of the Interior and other federal defendants, by failing to obtain reimbursement for costs of constructing Stampede, violated the Washoe Project Act and related reclamation laws.

Stampede is part of the Washoe Reclamation Project (Project), which Congress authorized in 1956.[1] In 1958, Congress amended the Washoe Project Act to authorize increased construction costs and to add another dam to the Project.[2]

The District was formed in 1958 under Nevada law to act as the agency to purchase the water stored by the Washoe Project, as required under 43 U.S.C. § 485a(g). In 1965, before Stampede was constructed, the District and the United States entered into a contract to repay the United States for most of the Project costs in exchange for the delivery of water. The contract would become effective when the parties agreed to a supplemental contract (the "Stampede Addition") which would allocate the repayment costs of the Stampede Division. The Bureau of Reclamation (Bureau) recommended that the Secretary execute the Stampede Addition, but to date no Secretary has done it.

The parties contest the design and purposes of Stampede's operations. Under the Washoe Project Act, the Secretary controls the flow of the Truckee River by releases from Stampede. Plaintiffs assert that Congress intended the Project be used primarily for "reimbursable" reclamation functions such as irrigation, power generation, and municipal water supply. Stampede was completed in 1970 but the Secretary and Bureau have operated Stampede for only fishery experiments and the development of fish resources, both nonreimbursable functions.

Under the Act, the purposes of the Project were flood control, irrigation, storage against drought, power generation, development of fish and wildlife resources, and

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[1] Pub. L. No. 84-858, 70 Stat. 775 (codified at 43 U.S.C. §§ 614-614d (1956) (Washoe Project Act).

[2] Pub. L. No. 85-706, 72 Stat. 705 (codified at 43 U.S.C. § 614d (1958).

"other beneficial purposes." 43 U.S.C. § 614. The plaintiffs argue that M&I uses are included among its other purposes and that M&I uses are now the only potential source of income for the reimbursement requirements of the Washoe Project Act.

In an earlier proceeding in this case, Judge Harry Claiborne held that Congress intended the Project to be operated so that its construction costs would be substantially repaid. The estimated total cost of the original Project was 41 million dollars. Only eight million dollars of that cost was allocated to flood control, a nonreimbursable operation. Congress also provided a fish hatchery for the restoration of Pyramid Lake Fishery and for a small dam to regulate fish flows on the Truckee River. Congress also prohibited the Secretary from spending more than two million dollars for the development of fish and wildlife resources.

To ensure that a substantial part of the cost of the Project would be repaid, Congress directed the Secretary to enter into repayment contracts before delivering any Project water. 43 U.S.C. § 614a(c). When the original Project was planned, the demand for additional water was expected to come from the irrigation operations of its customers but the rapid growth of Reno and Sparks since the mid-1950's created an unexpected need for additional M&I water. The District asked the Bureau to study this need and to provide for it in the Definite Plan Report for the Project.

The Water Supply Act of 1958, 43 U.S.C. § 390b did not resolve the question whether the Secretary was authorized to use Stampede water for M&I purposes in the Reno-Sparks area. However, in 1963 the Solicitor's office advised the Bureau that M&I uses were authorized under the Washoe Project Act as one of the other beneficial purposes contemplated by the statute. 43 U.S.C. § 614.

In 1964, a special Department of Interior Task Force studied the feasibility of allocating project water for the

maintenance of fishery flows for certain species in Pyramid Lake which spawn along the bed of the Truckee River. The Task Force recommended that 16,900 acre-feet[3] of Stampede's annual yield be allocated to Nevada M&I use, 6,000 acre-feet to California M&I use, and 6,300 acre-feet to fishery uses, or a total of 29,200 acre-feet.

Shortly thereafter, the Definite Plan Report prepared by the Bureau provided that Stampede would supply 45,800 acre-feet for M&I purposes on a divertible basis, including 29,200 acre-feet on a depletable basis, for parts of the Truckee River basin in California, and for the Reno-Sparks area in Nevada.

In 1966, when the Bureau was about to start constructing Stampede, two developments threatened to delay construction. First, it appeared that a 1926 contract between the United States and the Truckee-Carson Irrigation District would have to be revised and approved by Congress before water from the Truckee could be diverted and distributed by the plaintiffs. Second, the Commissioner of the Bureau of Indian Affairs informed the Secretary that the Project did not provide adequate safeguards to protect the Pyramid Lake Indians' interest in preserving the lake and its fishery. The Tribe had withdrawn an initial objection to the Washoe Project when the Secretary assured the Tribe that 215,000 acre-feet of water would enter Pyramid Lake once the Project was operating. Studies completed in 1966 did not support this estimate.

Without executing a contract with the District, the Secretary commenced construction because he concluded that there was an immediate need for flood control protection for both the Boca Dam and the Reno-Sparks area. The Secretary directed that until the water rights prob-

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[3] An acre-foot is a unit used to measure water storage; it means the amount of water contained by a one-acre surface area one foot deep.

lems were resolved, the dam and the reservoir would be used for flood control, fish and wildlife benefits, and recreation.

In 1967, the Secretary declared the cui-ui fish population of Pyramid Lake an endangered species. 32 Fed.Reg. 4001 (1967). In 1975, the Lahontan cutthroat trout, which had already been declared to be an endangered species, was declared to be threatened with extinction. 40 Fed.Reg. 29863 (1975). This action was taken because the reduced flow of water resulting from the diversion of water at the Derby Dam had eliminated much of its spawning run.

In 1969, the Secretary notified the District that he no longer intended to operate Stampede for M&I purposes and that until legal rights to the water were settled he would operate it only for "flood control, recreation, and fish and wildlife benefits . . ."

In *United States v. Truckee-Carson Irrigation District, et al.*, No. R-2987-JBA (D.Nev. 1977), (*U.S. v. T.C.I.D.*) the district court rejected the demand of the government for reserved water rights for the Pyramid Lake Paiute Indians for fishery purposes. On appeal, this holding was partly reversed and the case was remanded to the district court for further proceedings. 649 F.2d 1286 (1981). The defendants in this case contend that *U.S. v. T.C.I.D.* may have a collateral estoppel effect on the water rights to be considered here.

This case raises a number of issues. In the first phase, I shall consider those issues that require no factual findings. They are:

(1) Do plaintiffs have standing to challenge the Secretary's action?

(2) Do the plaintiffs have a private right of action under the reclamation laws?

(3) Is the government required to obtain a reimbursement contract? If so, can reimbursement

be achieved through a contract to supply M&I water to the District?

(4) Is the state of Nevada entitled to a declaratory judgment on the issue of whether the Secretary's present operations of Stampede require a permit from the Nevada State Engineer?

I. STANDING

The defendants contend that plaintiffs Sierra Pacific and the District lack standing to challenge the Secretary's operations of Stampede because: (1) the plaintiffs cannot show that they have suffered actual or threatened injury as a result of the Secretary's conduct, which injury would be redressed by a favorable decision, *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99, 99 S.Ct. 1601, 1697, 60 L.Ed.2d 66 (1979); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 96 S.Ct. 1917, 1924, 48 L.Ed.2d 450 (1976); and (2) plaintiffs are not members of the class for which the reimbursement provisions of the reclamation laws are designed to benefit. *Warth v. Seldin*, 422 U.S. 490, 498-99, 95 S.Ct. 2197, 2204-05, 45 L.Ed.2d 343 (1975).

To satisfy the first requirement, the plaintiff's interest in the outcome of the action must be unique or special; a simple taxpayer's interest in the lawful use of his revenues is insufficient. *United States v. Richardson*, 418 U.S. 166, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974). The plaintiff's interest may not be "shared in substantially equal measure by all or a large class of citizens." *Warth v. Seldin*, 422 U.S. at 499, 95 S.Ct. at 2205.

The Secretary is under no obligation to contract with a particular entity for the distribution of reclamation water, and in theory may contract with any organization which satisfies the requirements under the reclamation laws. Here, there are no other entities in the Truckee Meadows area seeking the right to distribute Stampede

water. The District was created for the express purpose of buying this water from the Stampede Reservoir. Therefore, the injury is sufficiently specific to trigger standing.

In *Bryant v. Yellen*, 447 U.S. 352, 367, 100 S.Ct. 2232, 2240, 65 L.Ed.2d 184 (1980), the Secretary of the Interior sued the Imperial Irrigation District to enforce an "excess lands" provision. This provision limits each recipient of federal reclamation water to a maximum of 160 acres of land, and requires the owners of larger parcels to sell excess lands at below-market prices. The District Court held against the Secretary, and the Secretary decided not to appeal. Imperial Valley residents sought leave to intervene for the purpose of appeal. The Supreme Court held that the residents had standing to appeal based upon their allegations that (a) the plaintiffs lived in the Valley, (b) they were farm workers who did not own farmland, (c) they desired to purchase excess lands irrigated with reclamation water, and (d) those excess lands would have been sold at below-market prices.

The Washoe Project was designed to develop scarce water resources to be sold to water users in the area. The Secretary has refused to sell the Project's water, which the plaintiffs want to buy. A judgment ordering the Secretary to seek repayment contracts will almost certainly benefit the plaintiffs because they are the only entities in the area with the ability to purchase the water. Their claim of a particularized injury is stronger than that of the plaintiffs in *Yellen*, and is sufficient to give them standing to maintain this action.

I therefore hold that plaintiffs have standing to maintain this action.

II.

PRIVATE RIGHT OF ACTION UNDER THE RECLAMATION LAWS

Defendants contend that even if plaintiffs satisfy the standing requirements, the reclamation laws that govern the Secretary's actions are not enforceable by private parties. Plaintiffs assert that under the Administrative Procedure Act, 5 U.S.C. § 702 (1976), private parties may enforce the Secretary's obligation to obtain partial reimbursement for the construction costs of Stampede. Plaintiffs also assert that the courts have the authority to compel the Secretary to comply with the reimbursement obligation.

Reclamation funds are proceeds of public lands which are reinvested to construct projects that are too expensive for private interests or states to finance. *Swigart v. Baker*, 229 U.S. 187, 197, 33 S.Ct. 645, 647, 57 L.Ed. 1143 (1913). Reclamation funds are continually reinvested for projects which eventually pay for themselves. The Reclamation Project Act of 1939, 43 U.S.C. § 485h (1976), set out procedures which the Secretary must follow to obtain authorization for new projects. Section 485h(a) prohibits expenditures for any new project unless the Secretary has submitted to Congress a feasibility report which includes estimates of the project cost and the portion to be paid by water users. When probable repayments exceed costs, the project is automatically authorized. But when expected payments fall short of project costs, the Secretary cannot proceed without specific Congressional authorization.

The Washoe Project Act incorporates the overall Congressional plan for the Truckee and Carson Rivers. The Project was originally designed to be 86% reimbursable, and was primarily intended to benefit water users in the area. Section 2(c) of the Act requires the Secretary to

obtain repayment contracts before delivering any water.[4] 43 U.S.C. § 614a(c) (1976). Other sections of the Act limit the Secretary's authorization to build recreation or fish and wildlife facilities. 43 U.S.C. §§ 614b, 614c (1976). Congress intended that the Secretary obtain repayment for the costs of the Project, except for amounts specifically allocated to nonreimbursable functions. The committees which studied the Project assumed that water users would repay most of the Project's cost, and the legislative history of the Washoe Project Act supports this view.

Federal courts may review the Secretary's actions to ensure that he exercises his authority over federal waters within the statutory constraints. *Arizona v. California*, 373 U.S. 546, 584-5, 590, 83 S.Ct. 1468, 1489-90, 1492, 10 L.Ed.2d 542 (1963). In *Arizona Power Pooling Association v. Morton*, 527 F.2d 721 (9th Cir. 1975), *cert. denied*, 425 U.S. 911, 96 S.Ct. 1506, 47 L.Ed.2d 761 (1976), an association of consumer-owned utilities brought an action to compel the Secretary to sell them surplus power from the Central Arizona Project. The reclamation laws required the Secretary to give preference to municipalities and public corporations for power sales. 43 U.S.C. § 485h(c). Instead, the Secretary sold the power to private companies. The Ninth Circuit held that the Secretary did not have unfettered discretion to operate the project, and that the Secretary could not disregard the preference provision unless the preference would impair the efficiency of the project for irrigation purposes.

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[4] Section 2(c), codified at 43 U.S.C. § 614a(c), provides:

> [T]he Secretary, prior to the delivery of project water supplies, shall have entered into a contract or contracts with an organization or organizations as defined in section 485a(g) of this title, which have the capacity to levy assessments upon all taxable real property located within their boundaries to assist in making repayments.

The court in *Arizona Power Pooling* reviewed the Secretary's actions under the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.* (1976). Section 702 grants a right of judicial review to any person adversely affected or injured by agency action, except when (a) the statute itself expressly precludes judicial review, or (b) "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a) (1976).

The defendants here contend that exception (b) applies because the Secretary has wide discretion in carrying out reclamation operations. To restrict judicial review requires "clear and convincing evidence" of legislative intent. *Barlow v. Collins*, 397 U.S. 159, 166, 90 S.Ct. 832, 837, 25 L.Ed.2d 192 (1970). In *Arizona Power Pooling, supra*, 527 F.2d at 727, the court stated:

> [T]he "committed to agency discretion" exception is a very narrow one which is applicable only in "those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" [*Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410, 91 S.Ct. 814, 820, 28 L.Ed. 2d 136 (1971).]

Here, the reimbursement provision restricts the Secretary's authority. Without judicial review, there is no mechanism to enforce Congressional instructions. *See City of Santa Clara, Cal. v. Andrus*, 572 F.2d 660, 666 (9th Cir. 1978); *cf. Arizona Power Authority v. Morton*, 549 F.2d 1231 (9th Cir. 1977), *cert. denied*, 434 U.S. 835, 98 S.Ct. 124, 54 L.Ed.2d 97 (review denied because broad statutory grant of discretion brought Secretary's actions within the agency discretion exception).

I hold that plaintiffs have a private right of action under the reclamation laws.

III.

AUTHORIZATION TO SELL WATER FOR M&I USES

Defendant-intervenor Pyramid Lake Paiute Tribe of Indians denies that the Secretary has an obligation to obtain reimbursement for the costs of Stampede. The Tribe also contends that the Secretary is not authorized to sell Stampede water for M&I uses. The Tribe bases its argument on the legislative history of the Washoe Project Act.

The Washoe Project Act does not mention M&I uses, but it does authorize the use of Stampede water for irrigation, drainage, storage, flood control, hydroelectric power, fish and wildlife, and "other beneficial purposes." 43 U.S.C. § 614. The Tribe argues that in spite of this broad language, Congress in 1955 specifically considered and rejected M&I water for Reno and Sparks. This contention is based on the feasibility report,[5] which permitted M&I water for other communities in the area. I question this conclusion because another passage of the report assumed that the population of Reno and Sparks, which now exceeds 140,000, would reach only 70,000 by the year 2000.

The need for more M&I water became apparent a few years after the enactment of the Washoe Project Act. The Bureau studied that need and concluded that the Definite Plan Report for Stampede authorized M&I uses. In 1963, the Bureau's Solicitor came to the same conclusion. In 1964, a special task force of the Interior Department recommended that Stampede water be sold for M&I uses. These interpretations by the agency charged with the administration of a project are entitled to deference. *California v. United States*, 438 U.S. 645,

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[5] The feasibility report is incorporated into the legislative history of the Washoe Project Act as H.R. Doc. No. 181, 84th Cong., 1st Sess. (1955).

676 n.30, 98 S.Ct. 2985, 3001 n.30, 57 L.Ed.2d 1018 (1977); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 735-6, 70 S.Ct. 955, 960-61, 94 L.Ed. 1231 (1949).

The Tribe also contends that the Water Supply Act of 1958, 43 U.S.C. § 390b(d), requires the Secretary to obtain Congressional approval before selling Stampede water for M&I uses. That Act prohibits modifications "which would seriously affect the purposes for which the project was authorized," unless Congress approves. The Tribe's argument assumes that M&I uses were not authorized by the Washoe Project Act, an assumption which I have already rejected.

The Secretary originally agreed with the Tribe; however, he now concedes that he is obligated to obtain reimbursement for the costs of Stampede, and that he is authorized to sell Stampede water for M&I uses. Nevertheless, the Secretary asserts that the District cannot compel the sale of M&I water without his determining the amount of water needed to satisfy the other purposes of the Washoe Project, or until the Tribe's water rights are settled and the endangered species are adequately protected. I have reserved decision on the effect of these rights and obligations for phase two of this litigation.

The Secretary also asserts that he may operate Stampede as he deems appropriate until Congress enacts new legislation. This litigation is primarily the result of the Secretary's failure to sign the Stampede Addition. Congressional hearings indicate that legislators are awaiting the decisions in this and related cases before enacting new legislation. Finally, the Secretary may not refuse to obtain repayment now merely because future events may provide other and even preferable sources of repayment.

Plaintiffs seek a judgment directing the Secretary to execute the Stampede Addition to the Repayment Con-

tract. Events since 1966 may have rendered the terms of that contract inappropriate. I therefore hold that the Secretary is obligated to sell all of the Stampede waters not required to fulfill his obligations under the Endangered Special Act and the Tribe's reserve water rights.

IV.

STATE WATER APPROPRIATION PERMITS

The State of Nevada seeks a declaration requiring the Secretary to obtain a permit from the Nevada State Engineer for Stampede's present operations. The State of California has issued two permits that authorize the storage of the Little Truckee River waters at Stampede. These waters are now captured, impounded, and released in California. None of this water is diverted from the natural channel of the Truckee River in Nevada.

In 1968, the Secretary applied to the Nevada State Engineer for a permit to appropriate water for M&I irrigation, and fish and wildlife purposes. Because the amount of water which would be appropriated for each use was uncertain, the Nevada State Engineer deferred action on these applications. These applications have not yet been granted or denied.

Section 533.325 of the Nevada Revised Statutes (NRS) provides that all persons who appropriate water in the State of Nevada for beneficial purposes must obtain water permits from the Nevada State Engineer. "Persons" is defined to include the United States. NRS 533.010.

In *California v. United States*, 438 U.S. 645, 98 S.Ct. 2985, 57 L.Ed.2d 1018 (1978), the Supreme Court held that the United States was required to obtain permits from the State of California to operate a federal reclamation project and to comply with all conditions imposed by the State which are consistent with Congressional directives. *Id.* at 676, 98 S.Ct. at 3001.

The Secretary concedes that a permit is necessary in order to divert water for M&I or irrigation purposes in the State of Nevada. However, the Secretary points out that none of the Bureau's present activities take place in Nevada. The Bureau releases water in California which flows into Nevada and empties into Pyramid Lake. There is no diversion or appropriation of water as those terms are commonly understood. Section 533.335(5) of the Nevada Revised Statutes supports this interpretation. That section requires a permit application to provide "a substantially accurate description of the location of the place at which the water is to be diverted from its source. And, if any water is to be returned to the source, . . . a description of the location of the place of return." Here, no water is diverted from its natural channel, and no diverted water is returned, so there can be no locations to describe, as required by this section. This interpretation is also supported by NRS 533.445, which provides that a reservoir manager need only give notice to the State Engineer when he intends to use the bed of a stream to carry stored water.

I hold that under Nevada law, "appropriation" means an actual diversion from the source, and therefore no permit is required for Stampede's present operations.

V.

CONCLUSIONS

I hold that the plaintiffs have standing to maintain this action, and that they have a private right of action under the Administrative Procedure Act to enforce the Secretary's reimbursement obligation. The Secretary is required to sell all of Stampede's water except that which is necessary to fulfill his trust obligations to the Tribe and to protect the endangered species which spawn in the Lower Truckee River.

I also hold that the Secretary needs no permit from the State of Nevada for Stampede's present operations.

APPENDIX D

UNITED STATES DISTRICT COURT,
D. NEVADA

No. CV-R-76-152-GJS

CARSON-TRUCKEE WATER CONSERVANCY DISTRICT, SIERRA PACIFIC POWER COMPANY, a corporation, and STATE OF NEVADA,
Plaintiffs,

v.

JAMES G. WATT, SECRETARY OF INTERIOR, *et al.*,
Defendants,

and

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Defendant-Intervenor.

Oct. 4, 1982

OPINION

SOLOMON, District Judge:

This is an action to compel the defendant, the Secretary of the Interior (Secretary) to store water in the Stampede Reservoir for the benefit of plaintiffs, and to compel the Secretary to enter into a contract with plaintiffs for plaintiffs to reimburse the United States government (government) for the costs of the Stampede Dam and Reservoir (Stampede).

Carson-Truckee Water Conservancy District, Sierra Pacific Power Company, and the State of Nevada, plaintiffs, filed this action against the Secretary and several bureau chiefs in the Department of Interior. The Pyramid Lake Paiute Tribe of Indians (Tribe) intervened as a defendant.

Stampede Dam was completed in 1970. Since that time, the Secretary and the Bureau of Reclamation have oper-

ated Stampede only for fishery development, flood control, and recreation. Plaintiffs contend that under the Washoe Project Act,[1] the Secretary is required to operate Stampede for reimbursible [*sic*] reclamation purposes such as irrigation, power generation, and municipal water supply.

In an earlier opinion,[2] I held that (1) the plaintiffs have standing to maintain this action, (2) plaintiffs have a private right to action under the Administrative Procedure Act, 5 U.S.C. § 702, to enforce the Secretary's obligation to obtain reimbursement for the construction costs of Stampede, (3) the Secretary must sell all of Stampede's water except the amount necessary to fulfill his trust obligations to the Tribe and to protect the endangered and threatened species which spawn in the Lower Truckee River, and (4) under Nevada law, the Secretary needs no permit from the Nevada State Engineer for Stampede's present operations. I reserved decision on the amount of water which the Secretary must provide (1) to satisfy his obligations under the Endangered Species Act[3] to conserve the endangered and threatened species of Pyramid Lake, and (2) to satisfy his trust obligations to preserve the Pyramid Lake fishery for the benefit of the Tribe.

I.

FACTS AND PROCEDURAL HISTORY

The Little Truckee River flows from the mountains of eastern California, through the Stampede Dam and Reservoir and Boca Dam, where it joins the Truckee

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[1] Pub. L. No. 84-858, 70 Stat. 775 (1956) (codified at 43 U.S.C. §§ 614-614d).

[2] *Carson-Truckee Water Conservancy District, et al. v. Watt and Pyramid Lake Paiute Tribe of Indians*, 537 F.Supp. 106 (D. Nev. 1982).

[3] Pub. L. 93-205, 87 Stat. 884 (1973) (codified at 16 U.S.C. §§ 1531-1543), as amended.

River. The Truckee River flows into Nevada through Reno and Sparks, and empties into Pyramid Lake.

Pyramid Lake is surrounded by the Pyramid Lake Paiute Indian Reservation. The reservation consists of 322,000 acres which was set aside in 1859, and confirmed by executive order in 1874. One of the purposes of the reservation was to enable the Tribe to take advantage of the Pyramid Lake fishery, which among other things includes a native species of cutthroat trout, and the cui-ui fish, which exists nowhere else.

In 1902, Congress passed the Reclamation Act The Secretary then withdrew land for the Newlands Reclamation Project. Most of the land was in the Carson River basin in Nevada. The Newlands Project was designed to divert water from both the Carson and Truckee Rivers for irrigation and storage.

The government claimed the right to all unappropriated water in the Truckee River, and constructed the Derby Dam on the lower Truckee River to divert water from that river below Reno into the Lahontan Reservoir.

In 1913, the government filed an action, *United States v. Orr Water Ditch Co., et al.*, against all water users along the Truckee River to quiet title to the water rights of all parties. The government claimed a small amount of water to irrigate lands on the Pyramid Lake Reservation, and claimed the rest of the water for the Newlands Project. The government did not claim water for the Pyramid Lake Fishery.

After the *Orr Ditch* decree was entered, the government contracted with the Truckee-Carson Irrigation District (TCID) to provide water for the Newlands project. Soon thereafter the level of the Lake began to drop,[4] and

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[4] Pyramid Lake loses approximately four feet per year, or 440,000 acre-feet, through evaporation and seepage. It receives approximately 55,000 acre-feet per year in precipitation and run-off from small streams, and the rest from the Truckee River. Water diverted

a delta was exposed at the mouth of the Truckee River which in most years was too shallow for the fish to pass upstream to their spawning grounds. Another problem related to the temperature of the water. Lahontan cutthroat trout require cooler water for spawning, available only above the Derby Dam. The Dam had a fish ladder, but it did not work well, and it eventually collapsed.

By 1938, the level of the Lake dropped 40 feet. Soon thereafter the cutthroat trout became extinct. By spawning along the edges of the Lake where the fresh Truckee River water entered, the cui-ui[4] barely survived.

In the 1940's the State of Nevada began to stock the Lake with cutthroat trout from nearby lakes and rivers.[5] In 1956, Congress appropriated funds to restore the fishery under the Washoe Project Act. That Act also provided for the construction of Stampede Dam for flood control, irrigation, power generation, development of fish and wildlife resources, storage against drought, and "other beneficial purposes", 43 U.S.C. § 614, including Municipal and Industrial (M & I) uses.

Disputes over water rights on the Truckee River delayed the construction of Stampede. Finally, in 1970, it was built because of an immediate need for flood control protection for the Reno-Sparks area.

In 1967, the Secretary declared the cui-ui fish population of Pyramid Lake an endangered species. 32 Fed.

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for irrigation in the Newlands Project does not return to the river, unlike the water diverted above the Derby Dam.

[5] The genetic composition of the original Pyramid Lake cutthroat trout is unknown. However, from 1890 to 1932 hundreds of millions of eggs were taken from the Pyramid Lake trout and used for stocking streams and lakes in Nevada and other states. It is probable that descendants of these fish were used to restock Pyramid Lake. Expert testimony indicates that the trout now living in Pyramid Lake are genetically similar to the original population.

Reg. 4001 (1967). In 1975, the Secretary declared the Lahontan cutthroat trout to be "threatened with extinction". 40 Fed. Reg. 29863 (1975).

In 1976, the Marble Bluff Dam and Fishway were completed. This fishway enables fish to bypass the delta and reach their spawning grounds. Releases of water from Stampede have not only helped provide the flows for the fishway, but have also provided cooler temperatures needed to trigger the spawning instinct.[6]

In *United States v. Truckee-Carson Irrigation District, et al.*, No. R-2987-JBA (D. Nev. 1977) (*T.C.I.D.*), the district court rejected the government's demand for reserved water rights for the Tribe's fishery. On appeal, this holding was partly reversed and the case was remanded. 649 F.2d 1286 (1981). The Court of Appeals held that (1) the Reclamation Act of 1902 did not authorize the Secretary to take Indian reserved water rights and use them to benefit the Newlands Project, 649 F.2d at 1298, (2) the *Orr Ditch* defendants and subsequent appropriators who relied upon the *Orr Ditch* decree could assert a defense of res judicata against T.C.I.D. and the Tribe, who were represented by the government, and (3) the Tribe was not precluded by res judicata from asserting rights against T.C.I.D., because the government did not adequately represent the interests of the Tribe in the *Orr Ditch* case.

The water right at issue in *T.C.I.D.* is vast,[7] and any water the Tribe is awarded on remand in *T.C.I.D.* may

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[6] The water temperature problem was aggravated in the 1940's when the Army Corps of Engineers removed a riparian shade canopy which grew along the banks of the lower Truckee River. Since 1970, the Secretary has been releasing Stampede water only during the spawning season (roughly, mid-March through June), in order to keep the water in the lower Truckee River cool enough for the fish to spawn there.

[7] The Newlands Project was given the rights to sufficient water to irrigate 232,000 acres of land assuming 3.5 acre-feet of water per acre of land, plus water lost in transportation. In comparison,

substantially diminish the amount of water required to satisfy the Tribe's claims here.

The parties disagree on whether the Court in *T.C.I.D.* expanded the amount of water which the government may claim from subsequent appropriators. Even if the amount of water is expanded, there is no overlap of issues which might cause collateral estoppel problems here because (1) plaintiff Carson-Truckee Water Conservancy District (Carson-Truckee) was not a party in *T.C.I.D.*, and (2) if the Tribe wins on remand in *T.C.I.D.*, there may be less water available for Stampede storage, but it will not affect the Secretary's obligation to store and sell to plaintiffs any water remaining after the *T.C.I.D.* obligations have been satisfied.

II.

ISSUES

The plaintiffs do not deny that the Secretary has obligations to the Tribe and under the Endangered Species Act which take precedence over his obligation to store water for municipal and industrial (M & I) use. However, plaintiffs contend that the amount of water necessary to fulfill those obligations is small, and that there is sufficient water for M & I storage after the water requirements under the Endangered Species Act have been satisfied.

The government and the Tribe contend that the Endangered Species Act requires the government to supply the fishery with sufficient water to get the species off the threatened and endangered lists. They contend that this goal requires more water than the entire yield of the Stampede Reservoir.

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the total storage capacity of Stampede Reservior is only 225,000 acre-feet. Currently, only 65,000 acres of the Newlands Project are being irrigated.

The government and the Tribe also contend that the plaintiffs already have enough water from other sources, and that they do not need any more water from Stampede. They also contend that the relief which plaintiffs seek is precluded by

(1) the Secretary's trust obligations to the Tribe, which is an issue also present in *T.C.I.D.*,

(2) the Secretary's failure to conduct a consultation as required by 16 U.S.C. § 1536,

(3) the absence of an Environmental Impact Statement, and

(4) the plaintiffs' lack of a Nevada water appropriation permit.

III.

THE ENDANGERED SPECIES ACT

Section 2(c) of the Endangered Species Act, 16 U.S.C. § 1531(c), requires that "all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter."

Section 2(b) of the Act, 16 U.S.C. § 1531(b), states in part:

> (b) The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species, . . .

The term "conserve" is defined in Section 3(2) of the Act, 16 U.S.C. § 1532(2):

> The terms "conserve", "conserving", and "conservation" mean to use and the use of all methods and procedures which are necessary to bring any endan-

> gered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary.

Plaintiffs contend that the Endangered Species Act does not prevent the Secretary from operating Stampede for M & I uses unless that operation would jeopardize the existence of the cui-ui fish and the Pyramid Lake Lahontan cutthroat trout. The defendants on the other hand contend that the Secretary has an obligation under the Act to replenish the species so that they are no longer endangered or threatened with extinction.

Specifically, the plaintiffs contend that:

(1) the Secretary is only obligated to avoid jeopardizing the bare survival of the species,

(2) the Secretary may refuse to store water for M & I use only if there is an "irresolvable conflict" between M & I storage and the bare survival of either species, and

(3) the Secertary must use other available methods to conserve the fish in order to store more water for M & I use.

The plaintiffs rely on section 7(a)(2) of the Act, as amended, 16 U.S.C. § 1536(a)(2), which states in part:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, . . . In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

Plaintiffs contend that this language permits federal agencies to supply only that amount of water necessary

to prevent the extinction of endangered species. I disagree.

The Supreme Court has held that the Act gives endangered species the highest priority over all federal projects. In *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978), the Court enjoined the completion of the Tellico Dam in order to prevent the extinction of the snail darter fish, whose critical habitat would be destroyed by the dam. At the time the injunction was issued, the dam was almost completed, and the loss to taxpayers was estimated at more than 50 million dollars. The Supreme Court reviewed the legislative history of the Endangered Species Act, and concluded that Congress regarded the value of endangered species to be "incalculable". *Id.* at 187, 98 S.Ct. at 2298. "The plain intent of Congress in enacting this statute was to halt and *reverse* the trend toward species extinction, whatever the cost." *Id.* at 184, 98 S.Ct. at 2296 (emphasis added). In enacting the Endangered Species Act, Congress has made "a conscious decision . . . to give endangered species priority over the 'primary missions' of federal agencies." *Id.* at 185, 98 S.Ct. at 2297.

Both of the cases on which plaintiffs rely, namely, *Sierra Club v. Froehlke*, 534 F.2d 1289 (8th Cir. 1976) and *National Wildlife Federation v. Coleman*, 529 F.2d 359 (5th Cir. 1976), *rehearing denied*, 532 F.2d 1375, *cert. denied*, 429 U.S. 979, 97 S.Ct. 489, 50 L.Ed.2d 587, were decided before *T.V.A. v. Hill*. In *Sierra Club*, environmentalists sued to enjoin the construction of a dam which would flood some caves where an endangered species of bats lived. The district court denied relief, and the court of appeals affirmed. The evidence there showed that only a tiny part of the endangered bats might be affected. In *Coleman*, the court held that construction of a highway which would destroy only a tiny part of the critical habitat of the Sandhill Crane was permissible if it would not jeopardize the existence of that species. The court remanded for further findings on that question.

Even assuming that these decisions do not conflict with *T.V.A. v. Hill*, they do not apply here. In both cases, the district court found that the proposed agency action would not jeopardize the existence of an endangered species. In both cases after consultations with the Secretary as required by 16 U.S.C. § 1536, the agency decided to go ahead with the project.

Here, there is no proposed agency action and no consultation with the Secretary. There is substantial evidence that plaintiffs' proposal would jeopardize the existence of the species.

The defendants rely on *Defenders of Wildlife v. Andrus*, 428 F.Supp. 167 (D.D.C. 1977) and *Connor v. Andrus*, 453 F.Supp. 1037 (W.D. Tex. 1978). Both involve challenges to the Secretary's hunting regulations. The plaintiffs in *Defenders of Wildlife* successfully challenged regulations which permitted hunting during twilight hours, when endangered species of birds could not be distinguished from game species. In *Connor*, the court set aside the Secretary's regulation prohibiting all duck hunting because it was arbitrary. However, both cases held that:

> [The Secretary] must do far more than merely avoid the elimination of protected species. [He] must bring these species back from the brink so that they may be removed from the protected class, and [he] must use all methods necessary to do so.

Defenders of Wildlife, 428 F.Supp. at 170; *accord, Connors*, 453 F.Supp. at 1041.

In my view this standard applies under the Endangered Species Act, and the Secretary is required to give the Pyramid Lake fishery priority over all other purposes of Stampede until the cui-ui fish and Lahontan cutthroat trout are no longer classified as endangered or threatened.

THE PYRAMID LAKE RESTORATION PROGRAM

The Secretary must store all water not required under the Endangered Species Act to conserve the Pyramid Lake fishery, but the amount of water available must be determined on the basis of the evidence. The Secretary's finding on the amount of water necessary for the fishery is entitled to deference. Under the Administrative Procedure Act, 5 U.S.C. § 706(2),[8] the standard of review is narrow. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 823, 28 L.Ed.2d 136 (1971). If the Secretary acted within his statutory authority, the test is whether his action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.*

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[8] 5 U.S.C. § 706 states:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
>
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

The Secretary is conducting a program to restore the cui-ui to a non-endangered status by developing a population which is self-sustaining through natural reproduction. He also seeks to restore the Pyramid Lake Lahontan cutthroat trout population to the point where it is no longer a threatened species. The timely release of water flows from Stampede are essential to this program.

Substantial evidence supports the Secretary's plan for operating Stampede.

A. *Water Requirements of the Cui-ui.*

All the parties concede that the cui-ui are an endangered species, and that the cui-ui are important to science as the only pure species remaining in the genus Chasmistes.

Until recenty, little was known about the life-cycle of the cui-ui. The spawning population appears at the river delta and fishway between mid-March and mid-April, depending on the volume of water entering the Lake. Upstream migration begins in May and lasts until mid-June, if the flows are sufficient. Unlike other species, the cui-ui do not die after spawning; they return to the Lake. Their eggs hatch in one to two weeks, depending on the water temperatures. Even the experts do not know the amount of time that the larval cui-ui spend in the river before returning to Pyramid Lake.

The temperatures in the River depend on the flow—the greater the volume during the spawning season, the lower the temperatures. The cui-ui restoration program requires large flows during the spawning season for three reasons:

(1) Large flows attract the spawning population to the mouth of the Pyramid Lake fishway, where they are captured for the Tribe's cui-ui hatchery. If the flows are not maintained over a period of several weeks before migration, the spawners will disperse and reabsorb their eggs.

(2) The cooler the river temperatures, the higher the migration, hatching, and survival rates of the larval cui-ui.[9]

(3) Without adequate water depth the spawners and larval cui-ui may be stranded in the river and die before they return to Pyramid Lake.

B. *Water Requirements of the Lahontan Cutthroat Trout*

The Lahontan cutthroat trout cannot spawn naturally in the Truckee River because they require lower temperatures and faster currents than the cui-ui. Their natural spawning grounds are inaccessible because the trout migration is blocked by the Derby Dam.

Like the cui-ui, the trout do not die after spawning. The young trout remain in the river for up to two years before returning to Pyramid Lake.

Access to the upper Truckee River is now blocked; therefore the trout population is being sustained by several hatcheries. The trout are captured in the fishway, to insure that only fish who attempt to migrate will reproduce. Large quantities of cool water are necessary to attract the spawners into the fishway.

I find that the releases of water from the Stampede Reservoir are necessary for the hatcheries to produce spawning Lahontan cutthroat trout that are adapted to their environment.

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[9] In warmer temperatures the fish are more susceptible to disease and the eggs are susceptible to fungus. Studies conducted by Dr. David Koch, one of the defendants' experts, show that the ideal temperature for larval cui-ui survival is 57 degrees. Although the design of his experiment did not duplicate natural conditions, the evidence showed that the plaintiffs' proposal to maintain a river temperature of approximately 68 degrees would permit only a small percentage of cui-ui to survive.

PLAINTIFFS' PROPOSAL FOR OPERATING STAMPEDE

For plaintiffs to be able to serve new M & I users, they must have enough water in storage to insure a steady supply in drought years. The plaintiffs' plan would require the release of M & I water in small quantities, and most of the total annual M & I releases would occur outside the spawning season, when it would not help increase the fish population.

Water releases for the fishery in a single year may require all of the Stampede storage, leaving no reserve for M & I users in drought years. In my view, it is not feasible to operate Stampede for both M & I and fishery purposes.

Plaintiffs concede that it is unlikely that the fish population of Pyramid Lake will increase substantially under their proposal for operating Stampede. The plaintiffs' plan would reduce the average river flow during the spawning season 20% below the level which existed before Stampede was built. This amount is inadequate to meet the Secretary's obligation under the Endangered Species Act. Before Stampede was built, there was not enough water for the cui-ui, and the cui-ui were practically extinct. The plaintiffs' proposal does not meet their own standards because it would jeopardize the existence of the cui-ui and hasten their extinction.

OTHER CONTENTIONS

A. *Consultation Requirements*

The plaintiffs are proposing a plan which would modify the critical spawning habitat of the cui-ui and the Lahontan cutthroat trout. The defendants point out that even if the Secretary was willing to adopt this plan, he could not do it without first satisfying the consultation procedures in 16 U.S.C. § 1536. That section requires the

Secretary to provide an opinion showing what effect his proposed plan of action would have on the species or habitat, to insure that it "is not likely to jeopardize the continued existence of any endangered species or threatened species."

There was no consultation here because there was no proposed agency action. I know of no authority authorizing a court to order a federal agency to take action affecting an endangered species without first satisfying the consultation requirements.

B. *Lake Level Requirements and Conservation Methods*

The defendants contend that Pyramid Lake must be maintained at its present level to prevent the concentration of total dissolved solids from making the Lake uninhabitable for fish. Defendants also contend that the plaintiffs can meet their anticipated water needs through conservation and other sources.

It is not necessary to consider these contentions, because I have held that the Secretary's operation of Stampede for the benefit of the endangered and threatened species of Pyramid Lake is not an abuse of discretion. Nevertheless, I note that these additional contentions are without merit. Under the plaintiffs' proposal, the average annual volume of water entering Pyramid Lake would be about the same,[10] even though the water would enter at different times. The plaintiffs' water needs are irrelevant because I have already held that the Washoe Project Act created an enforceable obligation on the part of the Secretary to obtain reimbursement for the construction costs of Stampede, and this obligation

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[10] Plaintiffs estimate that under their proposed plan, only 11,000 acre-feet per year would be lost from the system through M & I use. The rest would return to the Truckee River. Pyramid Lake requires approximately 285,000 acre-feet from the Truckee River to maintain a constant level.

is superseded only by the Endangered Species Act and the Tribe's fishery rights.

Similarly, there is no merit in plaintiffs' contention that the Secretary must use other available methods to conserve the fish which would permit more water to be stored for the plaintiffs' benefit. These methods would include the restoration of a riparian shade canopy along the river below the Derby Dam, the confinement of the River to a single channel, the transplantation of the cui-ui to a different habitat, and the construction of more hatcheries. Plaintiffs failed to produce evidence to show the feasibility or cost of these projects.

I find it was plaintiffs' burden to show the Secretary has abused his discretion. Plaintiffs seek to enforce the reimbursement provisions of the Washoe Project Act. Yet their proposal may require the Secretary to spend huge sums to conserve the fish, in order to sell them extra water. This proposal could very well defeat the purpose of the Act's reimbursement provisions, which is to maintain a large reclamation fund for continuous reinvestment in new projects.

I find that the plaintiffs have failed to show that the Secretary is abusing his discretion.

IV.

TRUST OBLIGATIONS TO THE TRIBE

In *T.C.I.D.*, the court held that one of the purposes of establishing the Pyramid Lake Reservation in 1859 was "to enable the Tribe to take advantage of the Pyramide Lake fishery, then consisting of a native species of cutthroat trout, and the cui-ui, . . ." *T.C.I.D.*, *supra*, 649 F.2d at 1290.

The amount of water necessary to satisfy the Tribe's fishery rights is disputed both in *T.C.I.D.* and in this case. The Tribe elected not to present any evidence on

this issue, but urges this court to allow the Secretary to use Stampede for the benefit of the fishery until the final judgment in *T.C.I.D.* determines the Tribe's rights.[11] The plaintiffs oppose the Tribe's request and seek an order requiring the Secretary to sell them water now on the ground that they would be entitled to the same percentage of any remaining storage in Stampede regardless of the holding in *T.C.I.D.*

In my view it is premature for me to determine this issue before *T.C.I.D.* is decided. Because I am holding that the Endangered Species Act requires the Secretary to use Stampede for the fishery, Stampede storage will not be available for M & I uses until the cui-ui and Lahontan cutthroat trout are no longer threatened or endangered. This may take many years. The fishery rights at issue here are intimately connected with issues that must be decided in *T.C.I.D.*, a case which has many parties including all of the parties in this case other than Carson-Truckee Water Conservancy District. Until *T.C.I.D.* is decided, the Secretary's trust obligations to the Tribe will not be known.

V.

OTHER ISSUES

I do not reach the question whether the Secretary requires an Environmental Impact Statement to enter into a repayment contract because I am holding that the Secretary is properly operating Stampede to conserve the threatened and endangered species of Pyramid Lake. I also do not reach the question whether the plaintiff's may claim rights as "subsequent appropriators" under the *T.C.I.D.* decision, because I will abstain from determining the Tribe's reserved fishery rights.

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[11] The pretrial order in this case barely mentioned the trust obligations, because at the time the pretrial order was entered, the Ninth Circuit had not yet overturned the district court's holding that the Reclamation Act extinguished the Tribe's fishery rights.

VI.

CONCLUSION

All of the claims asserted by the plaintiffs are denied and the Secretary is entitled to a judgment dismissing plaintiffs' action and holding that his operation of Stampede for the benefit of the Pyramid Lake cui-ui fish and the Lahontan cutthroat trout is reasonable and proper and does not constitute an abuse of discretion.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civil No. R-76-152 GJS

CARSON-TRUCKEE WATER CONSERVANCY DISTRICT, *et al.*,
Plaintiffs,

v.

JAMES G. WATT, Secretary of the Interior, *et al.*,
Defendants,

and

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Defendant-Intervenor.

[Filed Oct. 26, 1982]

JUDGMENT

Based on the Findings of Fact and Conclusions of Law contained in the Court's opinion dated October 4, 1982,

IT IS ORDERED AND ADJUDGED THAT:

1. The Secretary of Interior's decision not to sell Stampede water for municipal and industrial purposes to the plaintiffs was in accord with the Administrative Procedure Act, 5 U.S.C. § 501 et seq., and was not arbitrary, capricious, or an abuse of discretion.

2. The Secretary of the Interior is ordered to utilize the water stored in Stampede Reservoir for the benefit of the Pyramid Lake Fishery until such time as the cui-ui and Lahontan cutthroat trout are no longer classified as endangered or threatened species or until sufficient water becomes available from other sources to conserve the cui-ui and Lahontan cutthroat trout.

3. All claims asserted by plaintiffs are denied, and plaintiffs' action is dismissed with prejudice.

Dated this 22nd day of October, 1982.

/s/ [Illegible]
Judge

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civil No. R-76-152 BRT

CARSON-TRUCKEE WATER CONSERVANCY DISTRICT, *et al.*,
Plaintiffs,

v.

JAMES G. WATT, Secretary of the Interior, *et al.*,
Defendants,

and

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Defendant-In-Intervention.

MOTION TO AMEND JUDGMENT

The defendant Secretary of the Interior pursuant to Rule 59(e) of the Federal Rules of Civil Procedure moves for an amendment of this court's judgment which was entered on October 27, 1982, to include a provision which recognizes his statutory authority under the Endangered Species Act. A memorandum brief in support of this motion is attached.

Dated this 5th day of November, 1982

Respectfully submitted,

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APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civil No. R-76-152 BRT

CARSON-TRUCKEE WATER CONSERVANCY DISTRICT, *et al.*,
Plaintiffs,

v.

JAMES G. WATT, Secretary of the Interior, *et al.*,
Defendants,

and

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Defendant-In-Intervention.

MEMORANDUM IN SUPPORT OF MOTION TO AMEND JUDGMENT

Statement

The federal defendant, Secretary of the Interior (hereinafter "the Secretary"), seeks an amendment of the court's judgment in this case which was entered on October 27, 1982. That judgment followed an opinion dated October 4, 1982, and the submission by counsel for federal and tribal defendants of proposed judgments.

Discussion

This court has the power under Rule 59(e) of the Federal Rules of Civil Procedure to alter or amend a judgment after its entry.[1] *Miller* v. *Leavenworth-Jeffer-*

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[1] The full text of the rule reads:

(e) *Motion to Alter or Amend a Judgment.*

A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

son Electric Co-op Inc., 633 F.2d 1378 (10th Cir. 1981); *Mumma* v. *Reading Co.*, 247 F.Supp. 252 (D. Pa. 1965); 6A *Moore's Federal Practice* ¶ 59.12([1] (2d. Ed.). This power is discretionary and "permits the court to correct any error which comes to its attention because of such motion." *Continental Casualty Co.* v. *American Fidelity & Gas Co.*, 186 F.Supp. 173, 178 (D. Ill. 1959), aff'd 275 F.2d 381, amended, 190 F.Supp. 236.

In this case, the Secretary requests modification of the second enumerated paragraph of the judgment which provides that:

> The Secretary of the Interior is ordered to utilize the waters stored in Stampede Reservoir for the benefit of the Pyramid Lake Fishery until such time as the cui-ui and Lahontan cutthroat trout are no longer classified as endangered or threatened species or until sufficient water becomes available from other sources to conserve the cui-ui and Lahontan cutthroat trout.

This paragraph should be modified so that it does not foreclose possible implementation by the Secretary of Section 1536(b) of the Endanger [*sic*] Species Act, 16 U.S.C. § 1531-1543, as amended by Pub. L. No. 97-304 (enacted October 13, 1982). This section permits the Secretary to suggest those "reasonable and prudent alternatives" which he believes would not violate § 1536(a)(2) that can be taken by a federal agency after a jeopardy opinion has been issued. It is conceivable that some time in the future some of the waters of the Stampede Reservoir could be utilized under such a reasonable and prudent plan that the Secretary believes would not violate subsection (a)(2) of the Endangered Species Act. The Secretary is concerned that the judgment as it now reads, ordering him to utilize the waters of Stampede Reservoir for the fishery until the fish are no longer classified, might prevent the adoption of such reasonable and pru-

dent alternatives. To clarify this, the Secretary would suggest that paragraph 2 be modified by adding the following sentence: "Nothing in this order is intended to limit the Secretary's statutory authority under 16 U.S.C. §§ 1531-1543, as amended by Pub. L. No. 97-304 (enacted October 13, 1982)."

Conclusion

For these reasons, the Secretary requests adoption of this clarifying language.

Respectfully submitted,

LAMOND R. MILLS
United States Attorney

SHIRLEY A. SMITH
Assistant United States Attorney

/s/ Dale T. White
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APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civil No. R-76-152 GJS

CARSON-TRUCKEE WATER CONSERVANCY DISTRICT, *et al.*,
Plaintiffs,

v.

JAMES G. WATT, Secretary of the Interior, *et al.*,
Defendants,

and

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Defendant-Intervenor.

ORDER

IT IS ORDERED THAT:

The motions of Plaintiff Carson-Truckee Water Conservancy District for a new trial and for modification of the findings, conclusions, and judgment is [*sic*] denied.

The motion of the State of Nevada to amend the judgment is denied.

The motion of James G. Watt, Secretary of the Interior, to amend the judgment by adding the sentence:

> Nothing in this order is intended to limit the Secretary's statutory authority under 16 U.S.C. §§ 1531-1543, as amended by Pub. L. No. 97-304 (enacted October 13, 1982).

is denied. This motion is unnecessary. Nothing in the opinion or judgment directs the Secretary to release more Stampede water than is needed to assure the recovery of the endangered and threatened species of Pyramid Lake. The Secretary's direction is limited by the Endangered

Species Act itself, and nothing in the opinion or judgment limits the discretion of the Secretary in fulfilling his obligations under the Act.

The motion of Defendant-Intervenor Pyramid Lake Paiute Tribe of Indians for costs, expert witness fees, and attorneys' fees is granted but the fees and costs shall be limited to issues under the Endangered Species Act. The Tribe is directed to submit a list of issues for which the Tribe contends it is entitled to fees and costs, under the Endangered Species Act, including those on which the Tribe did not prevail.

The Tribe is not entitled to fees or costs from any of the Federal Defendants.

DATED this 22 day of December, 1982.

/s/ [Illegible]
Judge

APPENDIX I

ENDANGERED SPECIES ACT

§ 1531. Congressional findings and declaration of purposes and policy

(a) Findings

The Congress finds and declares that—

(1) various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation;

(2) other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction;

(3) these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people;

(4) the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife or plants facing extinction, pursuant to—

(A) migratory bird treaties with Canada and Mexico;

(B) the Migratory and Endangered Bird Treaty with Japan;

(C) the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere;

(D) the International Convention for the Northwest Atlantic Fisheries;

(E) the International Convention for the High Seas Fisheries of the North Pacific Ocean;

(F) the Convention on International Trade in Endangered Species of Wild Fauna and Flora; and

(G) other international agreements.

(5) encouraging the States and other interested parties, through Federal financial assistance and a system of incentives, to develop and maintain conservation programs which meet national and international standards is a key to meeting the Nation's international commitments and to better safeguarding, for the benefit of all citizens, the Nation's heritage in fish, wildlife, and plants.

(b) Purposes

The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

(c) Policy

(1) It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter.

(2) It is further declared to be the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species.

(Pub. L. 93-205, § 2, Dec. 28, 1973, 87 Stat. 884; Pub. L. 96-159, § 1, Dec. 28, 1979, 93 Stat. 1225; Pub. L. 97-304, § 9(a), Oct. 13, 1982, 96 Stat. 1426.)

§ 1532. Definitions

For the purpose of this chapter—

(1) The term "alternative courses of action" means all alternatives and thus is not limited to original project objectives and agency jurisdiction.

(2) The term "commercial activity" means all activities of industry and trade, including, but not limited to, the buying or selling of commodities and activities conducted for the purpose of facilitating such buying and selling: *Provided, however,* That it does not include exhibition of commodities by museums or similar cultural or historical organizations.

(3) The terms "conserve", "conserving", and "conservation" mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

(4) The term "Convention" means the Convention on International Trade in Endangered Species of Wild Fauna and Flora signed on March 3, 1973, and the appendices thereto.

(5) (A) The term "critical habitat" for a threatened or endangered species means—

(i) the specific areas within the geographical area occupied by the species, at the time it is

listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

(B) Critical habitat may be established for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established as set forth in subparagraph (A) of this paragraph.

(C) Except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.

(6) The term "endangered species" means any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this chapter would present an overwhelming and overriding risk to man.

(7) The term "Federal agency" means any department, agency, or instrumentality of the United States.

(8) The term "fish or wildlife" means any member of the animal kingdom, including without limitation any mammal, fish, bird (including any migratory, nonmigratory, or endangered bird for which

protection is also afforded by treaty or other international agreement), amphibian, reptile, mollusk, crustacean, arthropod or other invertebrate, and includes any part, product, egg, or offspring thereof, or the dead body or parts thereof.

(9) The term "foreign commerce" includes, among other things, any transaction—

(A) between persons within one foreign country;

(B) between persons in two or more foreign countries;

(C) between a person within the United States and a person in a foreign country; or

(D) between persons within the United States, where the fish and wildlife in question are moving in any country or countries outside the United States.

(10) The term "import" means to land on, bring into, or introduce into, or attempt to land on, bring into, or introduce into, any place subject to the jurisdiction of the United States, whether or not such landing, bringing, or introduction constitutes an importation within the meaning of the customs laws of the United States.

(11) Repealed. Pub. L. 97-304, § 4(b), Oct. 13, 1982, 96 Stat. 1420.

(12) The term "permit or license applicant" means, when used with respect to an action of a Federal agency for which exemption is sought under section 1436 of this title, any person whose application to such agency for a permit or license has been denied primarily because of the application of section 1536(a) of this title to such agency action.

(13) The term "person" means an individual, corporation, partnership, trust, association, or any

other private entity, or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State or political subdivision thereof, or of any foreign government.

(14) The term "plant" means any member of the plant kingdom, including seeds, roots, and other parts thereof.

(15) The term "Secretary" means, except as otherwise herein provided, the Secretary of the Interior or the Secretary of Commerce as program responsibilities are vested pursuant to the provisions of Reorganization Plan Numbered 4 of 1970; except that with respect to the enforcement of the provisions of this chapter and the Convention which pertain to the importation or exportation of terrestrial plants, the term means the Secretary of Agriculture.

(16) The term "species" includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.

(17) The term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, Guam, and the Trust Territory of the Pacific Islands.

(18) The term "State agency" means any State agency, department, board, commission, or other governmental entity which is responsible for the management and conservation of fish, plant, or wildlife resources within a State.

(19) The term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

(20) The term "threatened species" means any species which is likely to become an endangered

species within the foreseeable future throughout all or a significant portion of its range.

(21) The term "United States", when used in a geographical context includes all States.

(Pub. L. 93-205, § 3, Dec. 28, 1973, 87 Stat. 885; Pub. L. 94-359, § 5, July 12, 1976, 90 Stat. 913; Pub. L. 95-632, § 2, Nov. 10, 1978, 92 Stat. 3751; Pub. L. 96-159, § 2, Dec. 28, 1979, 93 Stat. 1225; Pub. L. 97-304, § 4(b), Oct. 13, 1982, 96 Stat. 1420.)

§ 1533. Determination of endangered species and threatened species

(a) Generally

(1) The Secretary shall by regulation promulgated in accordance with subsection (b) of this section determine whether any species is an endangered species or a threatened species because of any of the following factors:

(A) the present or threatened destruction, modification, or curtailment of its habitat or range;

(B) overutilization for commercial, recreational, scientific, or educational purposes;

(C) disease or predation;

(D) the inadequacy of existing regulatory mechanisms; or

(E) other natural or manmade factors affecting its continued existence.

(2) With respect to any species over which program responsibilities have been vested in the Secretary of Commerce pursuant to Reorganization Plan Numbered 4 of 1970—

(A) in any case in which the Secretary of Commerce determines that such species should—

(i) be listed as an endangered species or a threatened species, or

(ii) be changed in status from a threatened to an endangered species,

he shall so inform the Secretary of the Interior; who shall list such species in accordance with this section;

(B) in any case in which the Secretary of Commerce determines that such species should—

(i) be removed from any list published pursuant to subsection (c) of this section, or

(ii) be changed in status from an endangered species to a threatened species,

he shall recommend such action to the Secretary of the Interior, and the Secretary of the Interior, if he concurs in the recommendation, shall implement such action; and

(C) the Secretary of the Interior may not list or remove from any list any such species, and may not change the status of any such species which are listed, without a prior favorable determination made pursuant to this section by the Secretary of Commerce.

(3) The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable—

(A) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat; and

(B) may, from time-to-time thereafter as appropriate, revise such designation.

(b) Basis for determinations

(1) (A) The Secretary shall make determinations required by subsection (a) (1) of this section solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction; or on the high seas.

(B) In carrying out this section, the Secretary shall give consideration to species which have been—

(i) designated as requiring protection from unrestricted commerce by any foreign nation, or pursuant to any international agreement; or

(ii) identified as in danger of extinction, or likely to become so within the foreseeable future, by any State agency or by any agency of a foreign nation that is responsible for the conservation of fish or wildlife or plants.

(2) The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a) (3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

(3) (A) To the maximum extent practicable, within 90 days after receiving the petition of an interested person under section 553(e) of title 5, to add a species to, or to remove a species from, either of the lists published under subsection (c) of this section, the Secretary shall make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. If such a petition is found to present such information, the Secretary shall promptly commence a review of the status of the species concerned. The Secretary shall promtly publish each finding made under this subparagraph in the Federal Register.

(B) Within 12 months after receiving a petition that is found under subparagraph (A) to present substantial information indicating that the petitioned action may be warranted, the Secretary shall make one of the following findings:

(i) The petitioned action is not warranted, in which case the Secretary shall promptly publish such finding in the Federal Register.

(ii) The petitioned action is warranted, in which case the Secretary shall promptly publish in the Federal Register the complete text of a proposed regulation to implement such action in accordance with paragraph (5).

(iii) The petitioned action is warranted, but that—

(I) the immediate proposal and timely promulgation of a final regulation implementing the petitioned action in accordance with paragraphs (5) and (6) is precluded by pending proposals to determine whether any species is an endangered species or a threatened species, and

(II) expeditious progress is being made to add qualified species to either of the lists published under subsection (c) of this section and to remove from such lists species for which the protections of this chapter are no longer necessary,

in which case the Secretary shall promptly publish such finding in the Federal Register, together with a description and evaluation of the reasons and data on which the finding is based.

(C) (i) A petition with respect to which a finding is made under subparagraph (B) (iii) shall be treated as a petition that is resubmitted to the Secretary under subparagraph (A) on the date of such finding and that presents substantial scientific or commercial information that the petitioned action may be warranted.

(ii) Any negative finding described in subparagraph (A) and any finding described in subparagraph (B) (i) or (iii) shall be subject to judicial review.

(D) (i) To the maximum extent practicable, within 90 days after receiving the petition of an interested person under section 553(e) of title 5, to revise a critical habitat designation, the Secretary shall make a finding as to whether the petition presents substantial scientific information indicating that the revision may be warranted. The Secretary shall promptly publish such finding in the Federal Register.

(ii) Within 12 months after receiving a petition that is found under clause (i) to present substantial information indicating that the requested revision may be warranted, the Secretary shall determine how he intends to proceed with the requested revision, and shall promptly publish notice of such intention in the Federal Register.

(4) Except as provided in paragraphs (5) and (6) of this subsection, the provisions of section 553 of title 5

(relating to rulemaking procedures), shall apply to any regulation promulgated to carry out the purposes of this chapter.

(5) With respect to any regulation proposed by the Secretary to implement a determination, designation, or revision referred to in subsection (a)(1) or (3) of this section, the Secretary shall—

(A) not less than 90 days before the effective date of the regulation—

(i) publish a general notice and the complete text of the proposed regulation in the Federal Register, and

(ii) give actual notice of the proposed regulation (including the complete text of the regulation) to the State agency in each State in which the species is believed to occur, and to each country, or equivalent jurisdiction in which the species is believed to occur, and invite the comment of such agency, and each such jurisdiction, thereon;

(B) insofar as practical, and in cooperation with the Secretary of State, give notice of the proposed regulation to each foreign nation in which the species is believed to occur or whose citizens harvest the species on the high seas, and invite the comment of such nation thereon;

(C) give notice of the proposed regulation to such professional scientific organizations as he deems appropriate;

(D) publish a summary of the proposed regulation in a newspaper of general circulation in each area of the United States in which the species is believed to occur; and

(E) promptly hold one public hearing on the proposed regulation if any person files a request for

such a hearing within 45 days after the date of publication of general notice.

(6) (A) Within the one-year period beginning on the date on which general notice is published in accordance with paragraph (5) (A) (i) regarding a proposed regulation, the Secretary shall publish in the Federal Register—

(i) if a determination as to whether a species is an endangered species or a threatened species, or a revision of critical habitat, is involved, either—

(I) a final regulation to implement such determination,

(II) a final regulation to implement such revision or a finding that such revision should not be made,

(III) notice that such one-year period is being extended under subparagraph (B) (i), or

(IV) notice that the proposed regulation is being withdrawn under subparagraph (B) (ii), together with the finding on which such withdrawal is based; or

(ii) subject to subparagraph (C), if a designation of critical habitat is involved, either—

(I) a final regulation to implement such designation, or

(II) notice that such one-year period is being extended under such subparagraph.

(B) (i) If the Secretary finds with respect to a proposed regulation referred to in subparagraph (A) (i) that there is substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the determination or revision concerned, the Secretary may extend the one-year period specified in subparagraph (A) for not more than six months for purposes of soliciting additional data.

(ii) If a proposed regulation referred to in subparagraph (A)(i) is not promulgated as a final regulation within such one-year period (or longer period if extension under clause (i) applies) because the Secretary finds that there is not sufficient evidence to justify the action proposed by the regulation, the Secretary shall immediately withdraw the regulation. The finding on which a withdrawal is based shall be subject to judicial review. The Secretary may not propose a regulation that has previously been withdrawn under this clause unless he determines that sufficient new information is available to warrant such proposal.

(iii) If the one-year period specified in subparagraph (A) is extended under clause (i) with respect to a proposed regulation, then before the close of such extended period the Secretary shall publish in the Federal Register either a final regulation to implement the determination or revision concerned, a finding that the revision should not be made, or a notice of withdrawal of the regulation under clause (ii), together with the finding on which the withdrawal is based.

(C) A final regulation designating critical habitat of an endangered species or a threatened species shall be published concurrently with the final regulation implementing the determination that such species is endangered or threatened, unless the Secretary deems that—

(i) it is essential to the conservation of such species that the regulation implementing such determination be promptly published; or

(ii) critical habitat of such species is not then determinable, in which case the Secretary, with respect to the proposed regulation to designate such habitat, may extend the one-year period specified in subparagraph (A) by not more than one additional year, but not later than the close of such additional year the Secretary must publish a final regulation,

based on such data as may be available at that time, designating, to the maximum extent prudent, such habitat.

(7) Neither paragraph (4), (5) or (6) of this subsection nor section 553 of title 5 shall apply to any regulation issued by the Secretary in regard to any emergency posing a significant risk to the well-being of any species of fish or wildlife or plants, but only if—

(A) at the time of publication of the regulation in the Federal Register the Secretary publishes therein detailed reasons why such regulation is necessary; and

(B) in the case such regulation applies to resident species of fish or wildlife, or plants, the Secretary gives actual notice of such regulation to the State agency in each States in which such species is believed to occur.

Such regulation shall, at the discretion of the Secretary, take effect immediately upon the publication of the regulation in the Federal Register. Any regulation promulgated under the authority of this paragraph shall cease to have force and effect at the close of the 240-day period following the date of publication unless, during such 240-day period, the rulemaking procedures which would apply to such regulation without regard to this paragraph are complied with. If at any time after issuing an emergency regulation the Secretary determines, on the basis of the best appropriate data available to him, that substantial evidence does not exist to warrant such regulation, he shall withdraw it.

(8) The publication in the Federal Register of any proposed or final regulation which is necessary or appropriate to carry out the purposes of this chapter shall include a summary by the Secretary of the data on which such regulation is based and shall show the relationship of such data to such regulation; and if such regulation

designates or revises critical habitat, such summary shall, to the maximum extent practicable, also include a brief description and evaluation of those activities (whether public or private) which, in the opinion of the Secretary, if undertaken may adversely modify such habitat, or may be affected by such designation.

(c) Lists

(1) The Secretary of the Interior shall publish in the Federal Register a list of all species determined by him or the Secretary of Commerce to be endangered species and a list of all species determined by him or the Secretary of Commerce to be threatened species. Each list shall refer to the species contained therein by scientific and common name or names, if any, specify with respect to each such species over what portion of its range it is endangered or threatened, and specify any critical habitat within such range. The Secretary shall from time to time revise each list published under the authority of this subsection to reflect recent determinations, designations, and revisions made in accordance with subsections (a) and (b) of this section.

(2) The Secretary shall—

(A) conduct, at least once every five years, a review of all species included in a list which is published pursuant to paragraph (1) and which is in effect at the time of such review; and

(B) determine on the basis of such review whether any such species should—

(i) be removed from such list;

(ii) be changed in status from an endangered species to a threatened species; or

(iii) be changed in status from a threatened species to an endangered species.

Each determination under subparagraph (B) shall be made in accordance with the provisions of subsections (a) and (b) of this section.

(d) Protective regulations

Whenever any species is listed as a threatened species pursuant to subsection (c) of this section, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 1538(a)(1) of this title, in the case of fish or wildlife, or section 1538(a)(2) of this title, in the case of plants, with respect to endangered species; except that with respect to the taking of resident species of fish or wildlife, such regulations shall apply in any State which has entered into a cooperative agreement pursuant to section 1535(c) of this title only to the extent that such regulations have also been adopted by such State.

(e) Similarity of appearance cases

The Secretary may, by regulation, and to the extent he deems advisable, treat any species as an endangered species or threatened species even though it is not listed pursuant to this section if he finds that—

(A) such species so closely resembles in appearance, at the point in question, a species which has been listed pursuant to such section that enforcement personnel would have substantial difficulty in attempting to differentiate between the listed and unlisted species;

(B) the effect of this substantial difficulty is an additional threat to an endangered or threatened species; and

(C) such treatment of an unlisted species will substantially facilitate the enforcement and further the policy of this chapter.

(f) Recovery plans

The Secretary shall develop and implement plans (hereinafter in this subsection referred to as "recovery plans") for the conservation and survival of endangered species and threatened species pursuant to this section, unless he finds that such a plan will not promote the conservation of the species. The Secretary, in developing and implementing recovery plans (1) shall, to the maximum extent practicable, give priority to those endangered species or threatened species most likely to benefit from such plans, particularly those species that are, or may be, in conflict with construction or other developmental projects or other forms of economic activity, and (2) may procure the services of appropriate public and private agencies and institutions, and other qualified persons. Recovery teams appointed pursuant to this subsection shall not be subject to the Federal Advisory Committee Act.

(g) Agency guidelines; publication in Federal Register; scope; proposals and amendments: notice and opportunity for comments

The Secretary shall establish, and publish in the Federal Register, agency guidelines to insure that the purposes of this section are achieved efficiently and effectively. Such guidelines shall include, but are not limited to—

(1) procedures for recording the receipt and the disposition of petitions submitted under subsection (b) (3) of this section;

(2) criteria for making the findings required under such subsection with respect to petitions;

(3) a ranking system to assist in the identification of species that should receive priority review under subsection (a)(1) of this section; and

(4) a system for developing and implementing, on a priority basis, recovery plans under subsection (f) of this section.

The Secretary shall provide to the public notice of, and opportunity to submit written comments on, any guideline (including any amendment thereto) proposed to be established under this subsection.

(h) Submission to State agency of justification for regulations inconsistent with State agency's comments or petition

If, in the case of any regulation proposed by the Secretary under the authority of this section, a State agency to which notice thereof was given in accordance with subsection (b)(5)(A)(ii) of this section files comments disagreeing with all or part of the proposed regulation, and the Secretary issues a final regulation which is in conflict with such comments, or if the Secretary fails to adopt a regulation pursuant to an action petitioned by a State agency under subsection (b)(3) of this section, the Secretary shall submit to the State agency a written justification for his failure to adopt regulations consistent with the agency's comments or petition.

(Pub. L. 93-205, § 4, Dec. 28, 1973, 87 Stat. 886; Pub. L. 94-359, § 1, July 12, 1976, 90 Stat. 911; Pub. L. 95-632, §§ 11, 13, Nov. 10, 1978, 92 Stat. 3764, 3766; Pub. L. 96-159, § 3, Dec. 28, 1979, 93 Stat. 1225; Pub. L. 97-304, § 2(a), Oct. 13, 1982, 96 Stat. 1411.)

§ 1534. Land acquisition

(a) Implementation of conservation program; authorization of Secretary and Secretary of Agriculture

The Secretary, and the Secretary of Agriculture with respect to the National Forest System, shall establish and implement a program to conserve fish, wildlife, and plants, including those which are listed as endangered species or threatened species pursuant to section 1533 of this title. To carry out such a program, the appropriate Secretary—

(1) shall utilize the land acquistion and other authority under the Fish and Wildlife Act of 1956, as amended [16 U.S.C. 742a et seq.], the Fish and Wildlife Coordination Act, as amended [16 U.S.C. 661 et seq.], and the Migratory Bird Conservation Act [16 U.S.C. 715 et seq.], as appropriate; and

(2) is authorized to acquire by purchase, donation, or otherwise, lands, waters, or interest therein, and such authority shall be in addition to any other land acquisition authority vested in him.

(b) Availability of funds for acquisition of lands, waters, etc.

Funds made available pursuant to the Land and Water Conservation Fund Act of 1965, as amended [16 U.S.C. 460*l*-4 et seq.], may be used for the purpose of acquiring lands, waters, or interests therein under subsection (a) of this section.

(Pub. L. 93-205, § 5, Dec. 28, 1973, 87 Stat. 889; Pub. L. 95-632, § 12, Nov. 10, 1978, 92 Stat. 3766.)

§ 1535. Cooperation with States

(a) Generally

In carrying out the program authorized by this chapter, the Secretary shall cooperate to the maximum extent practicable with the States. Such cooperation shall include consultation with the States concerned before acquiring any land or water, or interest therein, for the purpose of conserving any endangered species or threatened species.

(b) Management agreements

The Secretary may enter into agreements with any State for the administration and management of any area established for the conservation of endangered species or threatened species. Any revenues derived from the administration of such areas under these agreements shall be subject to the provisions of section 715s of this title.

(c) Cooperative agreements

(1) In furtherance of the purposes of this chapter, the Secretary is authorized to enter into a cooperative agreement in accordance with this section with any State which establishes and maintains an adequate and active program for the conservation of endangered species and threatened species. Within one hundred and twenty days after the Secretary receives a certified copy of such a proposed State program, he shall make a determination whether such program is in accordance with this chapter. Unless he determines, pursuant to this paragraph, that the State program is not in accordance with this chapter, he shall enter into a cooperative agreement with the State for the purpose of assisting in implementation of the State program. In order for a State program to be deemed an adequate and active program for the conservation of endangered species and threatened species, the

Secretary must find, and annually thereafter reconfirm such finding, that under the State program—

(A) authority resides in the State agency to conserve resident species of fish and wildlife determined by the State agency or the Secretary to be endangered or threatened;

(B) the State agency has established acceptable conservation programs, consistent with the purposes and policies of this chapter, for all resident species of fish or wildlife in the State which are deemed by the Secretary to be endangered or threatened, and has furnished a copy of such plan and program together with all pertinent details, information, and data requested to the Secretary;

(C) the State agency is authorized to conduct investigations to determine the status and requirements for survival of resident species of fish and wildlife;

(D) the State agency is authorized to establish programs, including the acquisition of land or aquatic habitat or interests therein, for the conservation of resident endangered or threatened species of fish or wildlife; and

(E) provision is made for public participation in designating resident species of fish or wildlife as endangered or threatened; or

that under the State program—

(i) the requirements set forth in subparagraphs (C), (D), and (E) of this paragraph are complied with, and

(ii) plans are included under which immediate attention will be given to those resident species of fish and wildlife which are determined by the Secre-

tary or the State agency to be endangered or threatened and which the Secretary and the State agency agree are most urgently in need of conservation programs; except that a cooperative agreement entered into with a State whose program is deemed adequate and active pursuant to clause (i) and this clause shall not affect the applicability of prohibitions set forth in or authorized pursuant to section 1533(d) of this title or section 1538(a)(1) of this title with respect to the taking of any resident endangered or threatened species.

(2) In furtherance of the purposes of this chapter the Secretary is authorized to enter into a cooperative agreement in accordance with this section with any State which establishes and maintains an adequate and active program for the conservation of endangered species and threatened species of plants. Within one hundred and twenty days after the Secretary receives a certified copy of such a proposed State program, he shall make a determination whether such program is in accordance with this chapter. Unless he determines, pursuant to this paragraph, that the State program is not in accordance with this chapter, he shall enter into a cooperative agreement with the State for the purpose of assisting in implementation of the State program. In order for a State program to be deemed an adequate and active program for the conservation of endangered species of plants and threatened species of plants, the Secretary must find, and annually thereafter reconfirm such finding, that under the State program—

(A) authority resides in the State agency to conserve resident species of plants determined by the State agency or the Secretary to be endangered or threatened;

(B) the State agency has established acceptable conservation programs, consistent with the purposes and policies of this chapter, for all resident species

of plants in the State which are deemed by the Secretary to be endangered or threatened, and has furnished a copy of such plan and program together with all pertinent details, information, and data requested to the Secretary;

(C) the State agency is authorized to conduct investigations to determine the status and requirements for survival of resident species of plants; and

(D) provision is made for public participation in designating resident species of plants as endangered or threatened; or

that under the State program—

(i) the requirements set forth in subparagraphs (C) and (D) of this paragraph are complied with, and

(ii) plans are included under which immediate attention will be given to those resident species of plants which are determined by the Secretary or the State agency to be endangered or threatened and which the Secretary and the State agency agree are most urgently in need of conservation programs; except that a cooperative agreement entered into with a State whose program is deemed adequate and active pursuant to clause (i) and this clause shall not affect the applicability of prohibitions set forth in or authorized pursuant to section 1533(d) or section 1538(a)(1) of this title with respect to the taking of any resident endangered or threatened species.

(d) Allocation of funds

(1) The Secretary is authorized to provide financial assistance to any State, through its respective State agency, which has entered into a cooperative agreement pursuant to subsection (c) of this section to assist in development of programs for the conservation of endan-

gered and threatened species. The Secretary shall make an allocation of appropriated funds to such States based on consideration of—

(A) the international commitments of the United States to protect endangered species or threatened species;

(B) the readiness of a State to proceed with a conservation program consistent with the objectives and purposes of this chapter;

(C) the number of endangered species and threatened species within a State;

(D) the potential for restoring endangered species and threatened species within a State; and

(E) the relative urgency to initiate a program to restore and protect an endangered species or threatened species in terms of survival of the species.

So much of any appropriated funds allocated for obligation to any State for any fiscal year as remains unobligated at the close thereof is authorized to be made available to that State until the close of the succeeding fiscal year. Any amount allocated to any State which is unobligated at the end of the period during which it is available for expenditure is authorized to be made available for expenditure by the Secretary in conducting programs under this section.

(2) Such cooperative agreements shall provide for (A) the actions to be taken by the Secretary and the States; (B) the benefits that are expected to be derived in connection with the conservation of endangered or threatened species; (C) the estimated cost of these actions; and (D) the share of such costs to be borne by the Federal Government and by the States; except that—

(i) the Federal share of such program costs shall not exceed 75 percent of the estimated program cost stated in the agreement; and

(ii) the Federal share may be increased to 90 percent whenever two or more States having a common interest in one or more endangered or threatened species, the conservation of which may be enhanced by cooperation of such States, enter jointly into an agreement with the Secretary.

The Secretary may, in his discretion, and under such rules and regulations as he may prescribe, advance funds to the State for financing the United States pro rata share agreed upon in the cooperative agreement. For the purposes of this section, the non-Federal share may, in the discretion of the Secretary, be in the form of money or real property, the value of which will be determined by the Secretary, whose decision shall be final.

(e) Review of State programs.

Any action taken by the Secretary under this section shall be subject to his periodic review at no greater than annual intervals.

(f) Conflicts between Federal and State laws

Any State law or regulation which applies with respect to the importation or exportation of, or interstate or foreign commerce in, endangered species or threatened species is void to the extent that it may effectively (1) permit what is prohibited by this chapter or by any regulation which implements this chapter, or (2) prohibit what is authorized pursuant to an exemption or permit provided for in this chapter or in any regulation which implements this chapter. This chapter shall not otherwise be construed to void any State law or regulation which is intended to conserve migratory, resident, or introduced fish or wildlife, or to permit or prohibit sale of such fish or wildlife. Any State law or regulation respecting the taking of an endangered species or threatened species may be more restrictive than the exemptions or permits provided for in this chapter or in

any regulation which implements this chapter but not less restrictive than the prohibitions so defined.

(g) Transition

(1) For purposes of this subsection, the term "establishment period" means, with respect to any State, the period beginning on December 28, 1973, and ending on whichever of the following dates first occurs: (A) the date of the close of the 120-day period following the adjournment of the first regular session of the legislature of such State which commences after December 28, 1973, or (B) the date of the close of the 15-month period following December 28, 1973.

(2) The prohibitions set forth in or authorized pursuant to sections 1533(d) and 1538(a)(1)(B) of this title shall not apply with respect to the taking of any resident endangered species or threatened species (other than species listed in Appendix I to the Convention or otherwise specifically covered by any other treaty or Federal law) within any State—

(A) which is then a party to a cooperative agreement with the Secretary pursuant to subsection (c) of this section (except to the extent that the taking of any such species is contrary to the law of such State); or

(B) except for any time within the establishment period when—

(i) the Secretary applies such prohibition to such species at the request of the State, or

(ii) the Secretary applies such prohibition after he finds, and publishes his finding, that an emergency exists posing a significant risk to the well-being of such species and that the prohibition must be applied to protect such species. The Secretary's finding and publication may be made without regard to the public hear-

ing or comment provisions of section 553 of title 5 or any other provision of this chapter; but such prohibition shall expire 90 days after the date of its imposition unless the Secretary further extends such prohibition by publishing notice and a statement of justification of such extension.

(h) Regulations

The Secretary is authorized to promulgate such regulations as may be appropriate to carry out the provisions of this section relating to financial assistance to States.

(Pub. L. 93-205, § 6, Dec. 28, 1973, 87 Stat. 889; Pub. L. 95-212, Dec. 19, 1977, 91 Stat. 1493; Pub. L. 95-632, § 10, Nov. 10, 1978, 92 Stat. 3762; Pub. L. 96-246, May 23, 1980, 94 Stat. 348; Pub. L. 97-304, §§ 3, 8(b), Oct. 13, 1982, 96 Stat. 1416, 1426.)

§ 1536. Interagency cooperation

(a) Federal agency actions and consultations

(1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued exist-

ence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

(3) Subject to such guidelines as the Secretary may establish, a Federal agency shall consult with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species.

(4) Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 1533 of this title or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. This paragraph does not require a limitation on the commitment of resources as described in subsection (d) of this section.

(b) Opinion of Secretary

(1)(A) Consultation under subsection (a)(2) of this section with respect to any agency action shall be concluded within the 90-day period beginning on the date on which initiated or, subject to subparagraph (B), within such other period of time as is mutually agreeable to the Secretary and the Federal agency.

(B) In the case of an agency action involving a permit or license applicant, the Secretary and the Federal agency may not mutually agree to conclude consultation

within a period exceeding 90 days unless the Secretary, before the close of the 90th day referred to in subparagraph (A)—

(i) if the consultation period proposed to be agreed to will end before the 150th day after the date on which consultation was initiated, submits to the applicant a written statement setting forth—

(I) the reasons why a longer period is required,

(II) the information that is required to complete the consultation, and

(III) the estimated date on which consultation will be completed; or

(ii) if the consultation period proposed to be agreed to will end 150 or more days after the date on which consultation was initiated, obtains the consent of the applicant to such period.

The Secretary and the Federal agency may mutually agree to extend a consultation period established under the preceding sentence if the Secretary, before the close of such period, obtains the consent of the applicant to the extension.

(2) Consultation under subsection (a)(3) of this section shall be concluded within such period as is agreeable to the Secretary, the Federal agency, and the applicant concerned.

(3)(A) Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a) of this section, the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secre-

tary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) of this section and can be taken by the Federal agency or applicant in implementing the agency action.

(B) Consultation under subsection (a)(3) of this section, and an opinion issued by the Secretary incident to such consultation, regarding an agency action shall be treated respectively as a consultation under subsection (a)(2) of this section, and as an opinion issued after consultation under such subsection, regarding that action if the Secretary reviews the action before it is commenced by the Federal agency and finds, and notifies such agency, that no significant changes have been made with respect to the action and that no significant change has occurred regarding the information used during the initial consultation.

(4) If after consultation under subsection (a)(2) of this section, the Secretary concludes that—

(A) the agency action will not violate such subsection, or offers reasonable and prudent alternatives which the Secretary believes would not violate such subsection; and

(B) the taking of an endangered species or a threatened species incidental to the agency action will not violate such subsection;

the Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statement that—

(i) specifies the impact of such incidental taking on the species,

(ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact, and

(iii) sets forth the terms and conditions (including, but not limited to, reporting requirements) that

must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under clause (ii).

(c) Biological assessment

(1) To facilitate compliance with the requirements of subsection (a)(2) of this section, each Federal agency shall, with respect to any agency action of such agency for which no contract for construction has been entered into and for which no construction has begun on November 10, 1978, request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action. If the Secretary advises, based on the best scientific and commercial data available, that such species may be present, such agency shall conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action. Such assessment shall be completed within 180 days after the date on which initiated (or within such other period as is mutually agreed to by the Secretary and such agency, except that if a permit or license applicant is involved, the 180-day period may not be extended unless such agency provides the applicant, before the close of such period, with a written statement setting forth the estimated length of the proposed extension and the reasons therefor) and, before any contract for construction is entered into and before construction is begun with respect to such action. Such assessment may be undertaken as part of a Federal agency's compliance with the requirements of section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

(2) Any person who may wish to apply for an exemption under subsection (g) of this section for that action may conduct a biological assessment to identify any endangered species or threatened species which is likely to

be affected by such action. Any such biological assessment must, however, be conducted in cooperation with the Secretary and under the supervision of the appropriate Federal agency.

(d) Limitation on commitment of resources

After initiation of consultation required under subsection (a)(2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.

(e) Endangered Species Committee

(1) There is established a committee to be known as the Endangered Species Committee (hereinafter in this section referred to as the "Committee").

(2) The Committee shall review any application submitted to it pursuant to this section and determine in accordance with subsection (h) of this section whether or not to grant an exemption from the requirements of subsection (a)(2) of this section for the action set forth in such application.

(3) The Committee shall be composed of seven members as follows:

(A) The Secretary of Agriculture.

(B) The Secretary of the Army.

(C) The Chairman of the Council of Economic Advisors.

(D) The Administrator of the Environmental Protection Agency.

(E) The Secretary of the Interior.

(F) The Administrator of the National Oceanic and Atmospheric Administration.

(G) The President, after consideration of any recommendations received pursuant to subsection (g) (2) (B) of this section shall appoint one individual from each affected State, as determined by the Secretary, to be a member of the Committee for the consideration of the application for exemption for an agency action with respect to which such recommendations are made, not later than 30 days after an application is submitted pursuant to this section.

(4) (A) Members of the Committee shall receive no additional pay on account of their service on the Committee.

(B) While away from their homes or regular places of business in the performance of services for the Committee, members of the Committee shall be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in the Government service are allowed expenses under section 5703 of title 5.

(5) (A) Five members of the Committee or their representatives shall constitute a quorum for the transaction of any function of the Committee, except that, in no case shall any representative be considered in determining the existence of a quorum for the transaction of any function of the Committee if that function involves a vote by the Committee on any matter before the Committee.

(B) The Secretary of the Interior shall be the Chairman of the Committee.

(C) The Committee shall meet at the call of the Chairman or five of its members.

(D) All meetings and records of the Committee shall be open to the public.

(6) Upon request of the Committee, the head of any Federal agency is authorized to detail, on a nonreimbursable basis, any of the personnel of such agency to the Committee to assist it in carrying out its duties under this section.

(7) (A) The Committee may for the purpose of carrying out its duties under this section hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence, as the Committee deems advisable.

(B) When so authorized by the Committee, any member or agent of the Committee may take any action which the Committee is authorized to take by this paragraph.

(C) Subject to the Privacy Act [5 U.S.C. 552a], the Committee may secure directly from any Federal agency information necessary to enable it to carry out its duties under this section. Upon request of the Chairman of the Committee, the head of such Federal agency shall furnish such information to the Committee.

(D) The Committee may use the United States mails in the same manner and upon the same conditions as a Federal agency.

(E) The Administrator of General Services shall provide to the Committee on a reimbursable basis such administrative support services as the Committee may request.

(8) In carrying out its duties under this section, the Committee may promulgate and amend such rules, regulations, and procedures, and issue and amend such orders as it deems necessary.

(9) For the purpose of obtaining information necessary for the consideration of an application for an exemption under this section the Committee may issue sub-

penas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents.

(10) In no case shall any representative, including a representative of a member designated pursuant to paragraph (3)(G) of this subsection, be eligible to cast a vote on behalf of any member.

(f) Promulgation of regulations; form and contents of exemption application

Not later than 90 days after November 10, 1978, the Secretary shall promulgate regulations which set forth the form and manner in which applications for exemption shall be submitted to the Secretary and the information to be contained in such applications. Such regulations shall require that information submitted in an application by the head of any Federal agency with respect to any agency action include, but not be limited to—

(1) a description of the consultation process carried out pursuant to subsection (a)(2) of this section between the head of the Federal agency and the Secretary; and

(2) a statement describing why such action cannot be altered or modified to conform with the requirements of subsection (a)(2) of this section.

(g) Application for exemption; report to Committee

(1) A Federal agency, the Governor of the State in which an agency action will occur, if any, or a permit or license applicant may apply to the Secretary for an exemption for an agency action of such agency if, after consultation under subsection (a)(2) of this section, the Secretary's opinion under subsection (b) of this section indicates that the agency action would violate subsection (a)(2) of this section. An application for an exemption shall be considered initially by the Secretary in the manner provided for in this subsection, and shall be con-

sidered by the Committee for a final determination under subsection (h) of this section after a report is made pursuant to paragraph (5). The applicant for an exemption shall be referred to as the "exemption applicant" in this section.

(2) (A) An exemption applicant shall submit a written application to the Secretary, in a form prescribed under subsection (f) of this section, not later than 90 days after the completion of the consultation process; except that, in the case of any agency action involving a permit or license applicant, such application shall be submitted not later than 90 days after the date on which the Federal agency concerned takes final agency action with respect to the issuance of the permit or license. For purposes of the preceding sentence, the term "final agency action" means (i) a disposition by an agency with respect to the issuance of a permit or license that is subject to administrative review, whether or not such disposition is subject to judicial review; or (ii) if administrative review is sought wth respect to such disposition, the decision resulting after such review. Such application shall set forth for the reasons why the exemption applicant considers that the agency action meets the requirements for an exemption under this subsection.

(B) Upon receipt of an application for exemption for an agency action under paragraph (1), the Secretary shall promptly (i) notify the Governor of each affected State, if any, as determined by the Secretary, and request the Governor so notified to recommend individuals to be appointed to the Endangered Species Committee for consideration of such application; and (ii) publish notice of receipt of the application in the Federal Register, including a summary of the information contained in the application and a description of the agency action with respect to which the application for exemption has been filed.

(3) The Secretary shall within 20 days after the receipt of an application for exemption, or within such other period of time as is mutually agreeable to the exemption applicant and the Secretary—

(A) determine that the Federal agency concerned and the exemption applicant have—

(i) carried out the consultation responsibilities described in subsection (a) of this section in good faith and made a reasonable and responsible effort to develop and fairly consider modifications or reasonable and prudent alternatives to the proposed agency action which would not violate subsection (a)(2) of this section;

(ii) conducted any biological assessment required by subsection (c) of this section; and

(iii) to the extent determinable within the time provided herein, refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d) of this section; or

(B) deny the application for exemption because the Federal agency concerned or the exemption applicant have not met the requirements set forth in subparagraph (A)(i), (ii), and (iii).

The denial of an application under subparagraph (B) shall be considered final agency action for purposes of chapter 7 of title 5.

(4) If the Secretary determines that the Federal agency concerned and the exemption applicant have met the requirements set forth in paragraph 3(A)(i), (ii), and (iii) he shall, in consultation with the Members of the Committee, hold a hearing on the application for exemption in accordance with sections 554, 555, and 556

(other than subsection (b) (1) and (2) thereof) of title 5 and prepare the report to be submitted pursuant to paragraph (5).

(5) Within 140 days after making the determinations under paragraph (3) or within such other period of time as is mutually agreeable to the exemption applicant and the Secretary, the Secretary shall submit to the Committee a report discussing—

(A) the availability of reasonable and prudent alternatives to the agency action, and the nature and extent of the benefits of the agency action and of alternative courses of action consistent with conserving the species or the critical habitat;

(B) a summary of the evidence concerning whether or not the agency action is in the public interest and is of national or regional significance;

(C) appropriate reasonable mitigation and enhancement measures which should be considered by the Committee; and

(D) whether the Federal agency concerned and the exemption applicant refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d) of this section.

(6) To the extent practicable within the time required for action under subsection (g) of this section, and except to the extent inconsistent with the requirements of this section, the consideration of any application for an exemption under this section and the conduct of any hearing under this subsection shall be in accordance with sections 554, 555, and 556 (other than subsection (b) (3) of section 556) of title 5.

(7) Upon request of the Secretary, the head of any Federal agency is authorized to detail, on a nonreimbursable basis, any of the personnel of such agency to

the Secretary to assist him in carrying out his duties under this section.

(8) All meetings and records resulting from activities pursuant to this subsection shall be open to the public.

(h) Grant of exemption

(1) The Committee shall make a final determination whether or not to grant an exemption within 30 days after receiving the report of the Secretary pursuant to subsection (g) (5) of this section. The Committee shall grant an exemption from the requirements of subsection (a) (2) of this section for any agency action if, by a vote of not less than five of its members voting in person—

(A) it determines on the record, based on the report of the Secretary, the record of the hearing held under subsection (g) (4) of this section and on such other testimony or evidence as it may receive, that—

(i) there are no reasonable and prudent alternatives to the agency action;

(ii) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest;

(iii) the action is of regional or national significance; and

(iv) neither the Federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources prohibited by subsection (d) of this section; and

(B) it establishes such reasonable mitigation and enhancement measures, including, but not limited to, live propagation, transplantation, and habitat acquisition and improvement, as are necessary and

appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned.

Any final determination by the Committee under this subsection shall be considered final agency action for purposes of chapter 7 of title 5.

(2) (A) Except as provided in subparagraph (B), an exemption for an agency action granted under paragraph (1) shall constitute a permanent exemption with respect to all endangered or threatened species for the purposes of completing such agency action—

(i) regardless whether the species was identified in the biological assessment; and

(ii) only if a biological assessment has been conducted under subsection (c) of this section with respect to such agency action.

(B) An exemption shall be permanent under subparagraph (A) unless—

(i) the Secretary finds, based on the best scientific and commercial data available, that such exemption would result in the extinction of a species that was not the subject of consultation under subsection (a) (2) of this section or was not identified in any biological assessment conducted under subsection (c) of this section, and

(ii) the Committee determines within 60 days after the date of the Secretary's finding that the exemption should not be permanent.

If the Secretary makes a finding described in clause (i), the Committee shall meet with respect to the matter within 30 days after the date of the finding.

(i) Review by the Secretary of State; violation of international treaty or other international obligation of United States

Notwithstanding any other provisions of this chapter, the Committee shall be prohibited from considering for exemption any application made to it, if the Secretary of State, after a review of the proposed agency action and its potential implications, and after hearing, certifies, in writing, to the Committee within 60 days of any application made under this section that the granting of any such exemption and the carrying out of such action would be in violation of an international treaty obligation or other international obligation of the United States. The Secretary of State shall, at the time of such certification, publish a copy thereof in the Federal Register.

(j) Exemption for national security reasons

Notwithstanding any other provision of this chapter, the Committee shall grant an exemption for any agency action if the Secretary of Defense finds that such exemption is necessary for reasons of national security.

(k) Exemption decision not considered major Federal action; environmental impact statement

An exemption decision by the Committee under this section shall not be a major Federal action for purposes of the National Environmental Policy Act of 1969 [42 U.S.C. 4321 et seq.]: *Provided*, That an environmental impact statement which discusses the impacts upon endangered species or threatened species or their critical habitats shall have been previously prepared with respect to any agency action exempted by such order.

(l) Committee order granting exemption; cost of mitigation and enhancement measures; report by applicant to Council on Environmental Quality

(1) If the Committee determines under subsection (h) of this section that an exemption should be granted with respect to any agency action, the Committee shall issue an order granting the exemption and specifying the mitigation and enhancement measures established pursuant to subsection (h) of this section which shall be carried out and paid for by the exemption applicant in implementing the agency action. All necessary mitigation and enhancement measures shall be authorized prior to the implementing of the agency action and funded concurrently with all other project features.

(2) The applicant receiving such exemption shall include the costs of such mitigation and enhancement measures within the overall costs of continuing the proposed action. Notwithstanding the preceding sentence the costs of such measures shall not be treated as project costs for the purposes of computing benefit-cost or other ratios for the proposed action. Any applicant may request the Secretary to carry out such mitigation and enhancement measures. The costs incurred by the Secretary in carrying out any such measures shall be paid by the applicant receiving the exemption. No later than one year after the granting of an exemption, the exemption applicant shall submit to the Council on Environmental Quality a report describing its compliance with the mitigation and enhancement measures prescribed by this section. Such a report shall be submitted annually until all such mitigation and enhancement measures have been completed. Notice of the public availability of such reports shall be published in the Federal Register by the Council on Environmental Quality.

(m) Notice requirement for citizen suits not applicable

The 60-day notice requirement of section 1540(g) of this title shall not apply with respect to review of any final determination of the Committee under subsection (h) of this section granting an exemption from the requirements of subsection (a)(2) of this section.

(n) Judicial review

Any person, as defined by section 1532(13) of this title, may obtain judicial review, under chapter 7 of title 5, of any decision of the Endangered Species Committee under subsection (h) of this section in the United States Court of Appeals for (1) any circuit wherein the agency action concerned will be, or is being, carried out, or (2) in any case in which the agency action will be, or is being, carried out outside of any circuit, the District of Columbia, by filing in such court within 90 days after the date of issuance of the decision, a written petition for review. A copy of such petition shall be transmitted by the clerk of the court to the Committee and the Committee shall file in the court the record in the proceeding, as provided in section 2112 of title 28. Attorneys designated by the Endangered Species Committee may appear for, and represent the Committee in any action for review under this subsection.

(o) Exemption as providing exception on taking of endangered species

Notwithstanding sections 1533(d) and 1538(a)(1)(B) and (C) of this title or any regulation promulgated to implement either such section—

(1) any action for which an exemption is granted under subsection (h) of this section shall not be considered to be a taking of any endangered species or threatened species with respect to any activity which is necessary to carry out such action; and

(2) any taking that is in compliance with the terms and conditions specified in a written statement provided under subsection (b)(4)(iii) of this section shall not be considered to be a taking of the species concerned.

(p) Exemptions in Presidentially declared disaster areas

In any area which has been declared by the President to be a major disaster area under the Disaster Relief Act of 1974 [42 U.S.C. 5121 et seq.], the President is authorized to make the determinations required by subsections (g) and (h) of this section by any project for the repair or replacement of a public facility substantially as it existed prior to the disaster under section 401 or 402 of the Disaster Relief Act of 1974 [42 U.S.C. 5171 or 5172], and which the President determines (1) is necessary to prevent the recurrence of such a natural disaster and to reduce the potential loss of human life, and (2) to involve an emergency situation which does not allow the ordinary procedures of this section to be followed. Notwithstanding any other provision of this section, the Committee shall accept the determinations of the President under this subsection.

(Pub. L. 93-205, § 7, Dec. 28, 1973, 87 Stat. 892; Pub. L. 95-632, § 3, Nov. 10, 1978, 92 Stat. 3752; Pub. L. 96-159, § 4, Dec. 28, 1979, 93 Stat. 1226; Pub. L. 97-304, §§ 4(a), 8(b), Oct. 13, 1982, 96 Stat. 1417, 1426.)

§ 1537. International cooperation

(a) Financial assistance

As a demonstration of the commitment of the United States to the worldwide protection of endangered species and threatened species, the President may, subject to the provisions of section 1306 of title 31, use foreign currencies accruing to the United States Government under the Agricultural Trade Development and Assistance Act

of 1954 [7 U.S.C. 1691 et seq.] or any other law to provide to any foreign country (with its consent) assistance in the development and management of programs in that country which the Secretary determines to be necessary or useful for the conservation of any endangered species or threatened species listed by the Secretary pursuant to section 1533 of this title. The President shall provide assistance (which includes, but is not limited to, the acquisition, by lease or otherwise, of lands, waters, or interests therein) to foreign countries under this section under such terms and conditions as he deems appropriate. Whenever foreign currencies are available for the provision of assistance under this section, such currencies shall be used in preference to funds appropriated under the authority of section 1542 of this title.

(b) Encouragement of foreign programs

In order to carry out further the provisions of this chapter, the Secretary, through the Secretary of State, shall encourage—

(1) foreign countries to provide for the conservation of fish or wildlife and plants including endangered species and threatened species listed pursuant to section 1533 of this title;

(2) the entering into of bilateral or multilateral agreements with foreign countries to provide for such conservation; and

(3) foreign persons who directly or indirectly take fish or wildlife or plants in foreign countries or on the high seas for importation into the United States for commercial or other purposes to develop and carry out with such assistance as he may provide, conservation practices designed to enhance such fish or wildlife or plants and their habitat.

(c) Personnel

After consultation with the Secretary of State, the Secretary may—

(1) assign or otherwise make available any officer or employee of his department for the purpose of cooperating with foreign countries and international organizations in developing personnel resources and programs which promote the conservation of fish or wildlife or plants; and

(2) conduct or provide financial assistance for the educational training of foreign personnel, in this country or abroad, in fish, wildlife, or plant management, research and law enforcement and to render professional assistance abroad in such matters.

(d) Investigations

After consultation with the Secretary of State and the Secretary of the Treasury, as appropriate, the Secretary may conduct or cause to be conducted such law enforcement investigations and research abroad as he deems necessary to carry out the purposes of this chapter.

(Pub. L. 93-205, § 8, Dec. 28, 1973, 87 Stat. 892; Pub. L. 96-159, § 5, Dec. 28, 1979, 93 Stat. 1228.)

§ 1537a. Convention implementation

(a) Management Authority and Scientific Authority

The Secretary of the Interior (hereinafter in this section referred to as the "Secretary") is designated as the Management Authority and the Scientific Authority for purposes of the Convention and the respective functions of each such Authority shall be carried out through the United States Fish and Wildlife Service.

(b) Management Authority functions

The Secretary shall do all things necessary and appropriate to carry out the functions of the Management Authority under the Convention.

(c) Scientific Authority functions; determinations

(1) The Secretary shall do all things necessary and appropriate to carry out the functions of the Scientific Authority under the Convention.

(2) The Secretary shall base the determination and advice given by him under Article IV of the Convention with respect to wildlife upon the best available biological information derived from professionally accepted wildlife management practices; but is not required to make, or require any State to make, estimates of population size in making such determinations or giving such advice.

(d) Reservations by the United States under Convention

If the United States votes against including any species in Appendix I or II of the Convention and does not enter a reservation pursuant to paragraph (3) of Article XV of the Convention with respect to that species, the Secretary of State, before the 90th day after the last day on which such a reservation could be entered, shall submit to the Committee on Merchant Marine and Fisheries of the House of Representatives, and to the Committee on the Environment and Public Works of the Senate, a written report setting forth the reasons why such a reservation was not entered.

(e) Wildlife preservation in Western Hemisphere

(1) The Secretary of the Interior (hereinafter in this subsection referred to as the "Secretary"), in cooperation with the Secretary of State shall act on behalf of and represent, the United States in all regards as required by the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere (56 Stat.

1354, T.S. 982, hereinafter in this subsection referred to as the "Western Convention"). In the discharge of these responsibilities, the Secretary and the Secretary of State shall consult with the Secretary of Agriculture, the Secretary of Commerce, and the heads of other agencies with respect to matters relating to or affecting their areas of responsibility.

(2) The Secretary and the Secretary of State shall, in cooperation with the contracting parties to the Western Convention and, to the extent feasible and appropriate, with the participation of State agencies, take such steps as are necessary to implement the Western Convention. Such steps shall include, but not be limited to—

(A) cooperation with contracting parties and international organizations for the purpose of developing personnel resources and programs that will facilitate implementation of the Western Convention;

(B) identification of those species of birds that migrate between the United States and other contracting parties, and the habitats upon which those species depend, and the implementation of cooperative measures to ensure that such species will not become endangered or threatened; and

(C) identification of measures that are necessary and appropriate to implement those provisions of the Western Convention which address the protection of wild plants.

(3) No later than September 30, 1985, the Secretary and the Secretary of State shall submit a report to Congress describing those steps taken in accordance with the requirements of this subsection and identifying the principal remaining actions yet necessary for comprehensive and effective implementation of the Western Convention.

(4) The provisions of this subsection shall not be construed as affecting the authority, jurisdiction, or respon-

sibility of the several States to manage, control, or regulate resident fish or wildlife under State law or regulations.

(Pub. L. 93-205, § 8A, as added Pub. L. 96-159, § 6(a)(1), Dec. 28, 1979, 93 Stat. 1228, and amended Pub. L. 97-304, § 5(a), Oct. 13, 1983, 96 Stat. 1421.)

§ 1538. Prohibited acts

(a) Generally

(1) Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to—

(A) import any such species into, or export any such species from the United States;

(B) take any such species within the United States or the territorial sea of the United States;

(C) take any such species upon the high seas;

(D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C);

(E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of commercial activity, any such species;

(F) sell or offer for sale in interstate or foreign commerce any such species; or

(G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 1533 of this title and promulgated by the Secretary pursuant to authority provided by this chapter.

(2) Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of plants listed pursuant to section 1533 of this title, it is unlawful for any person subject to the jurisdiction of the United States to—

(A) import any such species into, or export any such species from, the United States;

(B) remove and reduce to possession any such species from areas under Federal jurisdiction;

(C) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

(D) sell or offer for sale in interstate or foreign commerce any such species; or

(E) violate any regulation pertaining to such species or to any threatened species of plants listed pursuant to section 1533 of this title and promulgated by the Secretary pursuant to authority provided by this chapter.

(b) Species held in captivity or controlled environment

(1) The provisions of subsections (a)(1)(A) and (a)(1)(G) of this section shall not apply to any fish or wildlife which was held in captivity or in a controlled environment on (A) December 28, 1973, or (B) the date of the publication in the Federal Register of a final regulation adding such fish or wildlife species to any list published pursuant to subsection (c) of section 1533 of this title: *Provided*, That such holding and any subsequent holding or use of the fish or wildlife was not in the course of a commercial activity. With respect to any act prohibited by subsections (a)(1)(A) and (a)(1)(G) of this section which occurs after a period of 180 days from (i) December 28, 1973, or (ii) the date of publica-

tion in the Federal Register of a final regulation adding such fish and wildlife species to any list published pursuant to subsection (c) of section 1533 of this title, there shall be a rebuttable presumption that the fish or wildlife involved in such act is not entitled to the exemption contained in this subsection.

(2) (A) The provisions of subsection (a) (1) of this section shall not apply to—

(i) any raptor legally held in captivity or in a controlled environment on November 10, 1978; or

(ii) any progeny of any raptor described in clause (i);

until such time as any such raptor or progeny is intentionally returned to a wild state.

(B) Any person holding any raptor or progeny described in subparagraph (A) must be able to demonstrate that the raptor or progeny does, in fact, qualify under the provisions of this paragraph, and shall maintain and submit to the Secretary, on request, such inventories, documentation, and records as the Secretary may by regulation require as being reasonably appropriate to carry out the purposes of this paragraph. Such requirements shall not unnecessarily duplicate the requirements of other rules and regulations promulgated by the Secretary.

(c) Violation of Convention

(1) It is unlawful for any person subject to the jurisdiction of the United States to engage in any trade in any specimens contrary to the provisions of the Convention, or to possess any specimens traded contrary to the provisions of the Convention, including the definitions of terms in article I thereof.

(2) Any importation into the United States of fish or wildlife shall, if—

(A) such fish or wildlife is not an endangered species listed pursuant to section 1533 of this title but is listed in Appendix II to the Convention,

(B) the taking and exportation of such fish or wildlife is not contrary to the provisions of the Convention and all other applicable requirements of the Convention have been satisfied,

(C) the applicable requirements of subsections (d), (e), and (f) of this section have been satisfied, and

(D) such importation is not made in the course of a commercial activity,

be presumed to be an importation not in violation of any provision of this chapter or any regulation issued pursuant to this chapter.

(d) Imports and exports

(1) It is unlawful for any person to engage in business as an importer or exporter of fish or wildlife (other than shellfish and fishery products which (A) are not listed pursuant to section 1533 of this title as endangered species or threatened species, and (B) are imported for purposes of human or animal consumption or taken in waters under the jurisdiction of the United States or on the high seas for recreational purposes) or plants without first having obtained permission from the Secretary.

(2) Any person required to obtain permission under paragraph (1) of this subsection shall—

(A) keep such records as will fully and correctly disclose each importation or exportation of fish, wildlife, or plants made by him and the subsequent disposition made by him with respect to such fish, wildlife, or plants;

(B) at all reasonable times upon notice by a duly authorized representative of the Secretary, afford such representative access to his places of business, an opportunity to examine his inventory of imported fish, wildlife, or plants and the records required to be kept under subparagraph (A) of this paragraph, and to copy such records; and

(C) file such reports as the Secretary may require.

(3) The Secretary shall prescribe such regulations as are necessary and appropriate to carry out the purposes of this subsection.

(e) Reports

It is unlawful for any person importing or exporting fish or wildlife (other than shellfish and fishery products which (1) are not listed pursuant to section 1533 of this title as endangered or threatened species, and (2) are imported for purposes of human or animal consumption or taken in waters under the jurisdiction of the United States or on the high seas for recreational purposes) or plants to fail to file any declaration or report as the Secretary deems necessary to facilitate enforcement of this chapter or to meet the obligations of the Convention.

(f) Designation of ports

(1) It is unlawful for any person subject to the jurisdiction of the United States to import into or export from the United States any fish or wildlife (other than shellfish and fishery products which (A) are not listed pursuant to section 1533 of this title as endangered species or threatened species, and (B) are imported for purposes of human or animal consumption or taken in waters under the jurisdiction of the United States or on the high seas for recreational purposes) or plants, except at a port or ports designated by the Secretary of the

Interior. For the purpose of facilitating enforcement of this chapter and reducing the costs thereof, the Secretary of the Interior, with approval of the Secretary of the Treasury and after notice and opportunity for public hearing, may, by regulation, designate ports and change such designations. The Secretary of the Interior, under such terms and conditions as he may prescribe, may permit the importation or exportation at nondesignated ports in the interest of the health or safety of the fish or wildlife or plants, or for other reasons, if, in his discretion, he deems it appropriate and consistent with the purpose of this subsection.

(2) Any port designated by the Secretary of the Interior under the authority of section 668cc-4(d) of this title, shall, if such designation is in effect on December 27, 1973, be deemed to be a port designated by the Secretary under paragraph (1) of this subsection until such time as the Secretary otherwise provides.

(g) Violations

It is unlawful for any person subject to the jurisdiction of the United States to attempt to commit, solicit another to commit, or cause to be committed, any offense defined in his section.

(Pub. L. 93-205, § 9, Dec. 28, 1973, 87 Stat. 893; Pub. L. 95-632, § 4, Nov. 10, 1978, 92 Stat. 3760; Pub. L. 97-304, § 9(b), Oct. 13, 1982, 96 Stat. 1426.)

§ 1539. Exceptions

(a) Permits

(1) The Secretary may permit, under such terms and conditions as he shall prescribe—

(A) any act otherwise prohibited by section 1538 of this title for scientific purposes or to enhance the propagation or survival of the affected species, in-

cluding, but not limited to, acts necessary for the establishment and maintenance of experimental populations pursuant to subsection (j) of this section; or

(B) any taking otherwise prohibited by section 1538(a)(1)(B) of this title if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.

(2)(A) No permit may be issued by the Secretary authorizing any taking referred to in paragraph (1)(B) unless the applicant therefor submits to the Secretary a conservation plan that specifies—

(i) the impact which will likely result from such taking;

(ii) what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps;

(iii) what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and

(iv) such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan.

(B) If the Secretary finds, after opportunity for public comment, with respect to a permit application and the related conservation plan that—

(i) the taking will be incidental;

(ii) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking;

(iii) the applicant will ensure that adequate funding for the plan will be provided;

(iv) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and

(v) the measures, if any, required under subparagraph (A)(iv) will be met;

and he has received such other assurances as he may require that the plan will be implemented, the Secretary shall issue the permit. The permit shall contain such terms and conditions as the Secretary deems necessary or appropriate to carry out the purposes of this paragraph, including, but not limited to, such reporting requirements as the Secretary deems necessary for determining whether such terms and conditions are being complied with.

(C) The Secretary shall revoke a permit issued under this paragraph if he finds that the permittee is not complying with the terms and conditions of the permit.

(b) Hardship exemptions

(1) If any person enters into a contract with respect to a species of fish and wildlife or plant before the date of the publication in the Federal Register of notice of consideration of that species as an endangered species and the subsequent listing of that species as an endangered species pursuant to section 1533 of this title will cause undue economic hardship to such person under the contract, the Secretary, in order to minimize such hardship, may exempt such person from the application of section 1538(a) of this title to the extent the Secretary deems appropriate if such person applies to him for such exemption and includes with such application such information as the Secretary may require to prove such hardship; except that (A) no such exemption shall be for a duration of more than one year from the date of publication in the Federal Register of notice of consideration of the species concerned, or shall apply to a quantity of

fish or wildlife or plants in excess of that specified by the Secretary; (B) the one-year period for those species of fish or wildlife listed by the Secretary as endangered prior to December 28, 1973, shall expire in accordance with the terms of section 668cc-3 of this title; and (C) no such exemption may be granted for the importation or exportation of a specimen listed in Appendix I of the Convention which is to be used in a commercial activity.

(2) As used in this subsection, the term "undue economic hardship" shall include, but not be limited to:

(A) substantial economic loss resulting from inability caused by this chapter to perform contracts with respect to species of fish and wildlife entered into prior to the date of publication in the Federal Register of a notice of consideration of such species as an endangered species;

(B) substantial economic loss to persons who, for the year prior to the notice of consideration of such species as an endangered species, derived a substantial portion of their income from the lawful taking of any listed species, which taking would be made unlawful under this chapter; or

(C) curtailment of subsistence taking made unlawful under this chapter by persons (i) not reasonably able to secure other sources of subsistence; and (ii) dependent to a substantial extent upon hunting and fishing for subsistence; and (iii) who must engage in such curtailed taking for subsistence purposes.

(3) The Secretary may make further requirements for a showing of undue economic hardship as he deems fit. Exceptions granted under this section may be limited by the Secretary in his discretion as to time, area, or other factor of applicability.

(c) Notice and review

The Secretary shall publish notice in the Federal Register of each application for an exemption or permit which is made under this subsection. Each notice shall invite the submission from interested parties, within thirty days after the date of the notice, written data, views, or arguments with respect to the application; except that such thirty-day period may be waived by the Secretary in an emergency situation where the health or life of an endangered animal is threatened and no reasonable alternative is available to the applicant, but notice of any such waiver shall be published by the Secretary in the Federal Register within ten days following the issuance of the exemption or permit. Information received by the Secretary as a part of any application shall be available to the public as a matter of public record at every stage of the proceeding.

(d) Permit and exemption policy

The Secretary may grant exceptions under subsections (a)(1)(A) and (b) of this section only if he finds and publishes his finding in the Federal Register that (1) such exceptions were applied for in good faith, (2) if granted and exercised will not operate to the disadvantage of such endangered species, and (3) will be consistent with the purposes and policy set forth in section 1531 of this title.

(e) Alaska natives

(1) Except as provided in paragraph (4) of this subsection the provisions of this chapter shall not apply with respect to the taking of any endangered species or threatened species, or the importation of any such species taken pursuant to this section, by—

(A) any Indian, Aleut, or Eskimo who is an Alaskan Native who resides in Alaska; or

(B) any non-native permanent resident of an Alaskan native village;

if such taking is primarily for subsistence purposes. Non-edible byproducts of species taken pursuant to this section may be sold in interstate commerce when made into authentic native articles of handicrafts and clothing; except that the provisions of this subsection shall not apply to any non-native resident of an Alaskan native village found by the Secretary to be not primarily dependent upon the taking of fish and wildlife for consumption or for the creation and sale of authentic native articles of handicrafts and clothing.

(2) Any taking under this subsection may not be accomplished in a wasteful manner.

(3) As used in this subsection—

(i) The term "subsistence" includes selling any edible portion of fish or wildlife in native villages and towns in Alaska for native consumption within native villages or towns; and

(ii) The term "authentic native articles of handicrafts and clothing" means items composed wholly or in some significant respect of natural materials, and which are produced, decorated, or fashioned in the exercise of traditional native handicrafts without the use of pantographs, multiple carvers, or other mass copying devices. Traditional native handicrafts include, but are not limited to, weaving, carving, stitching, sewing, lacking, beading, drawing, and painting.

(4) Notwithstanding the provisions of paragraph (1) of this subsection, whenever the Secretary determines that any species of fish or wildlife which is subject to taking under the provisions of this subsection is an endangered species or threatened species, and that such taking materially and negatively affects the threatened

or endangered species, he may prescribe regulations upon the taking of such species by any such Indian, Aleut, Eskimo, or non-Native Alaskan resident of an Alaskan native village. Such regulations may be established with reference to species, geographical description of the area included, the season for taking, or any other factors related to the reason for establishing such regulations and consistent with the policy of this chapter. Such regulations shall be prescribed after a notice and hearings in the affected judicial districts of Alaska and as otherwise required by section 1373 of this title, and shall be removed as soon as the Secretary determines that the need for their impositions has disappeared.

(f) Pre-Act endangered species parts exemption; application and certification; regulation; validity of sales contract; separability of provisions; renewal of exemption expiration of renewal certification

(1) As used in this subsection—

(A) The term "pre-Act endangered species part" means—

(i) any sperm whale oil, including derivatives thereof, which was lawfully held within the United States on December 28, 1973, in the course of a commercial activity; or

(ii) any finished scrimshaw product, if such product or the raw material for such product was lawfully held within the United States on December 28, 1973, in the course of a commercial activity.

(B) The term "scrimshaw product" means any art form which involves the substantial etching or engraving of designs upon, or the substantial carving of figures, patterns, or designs from, any bone or tooth of any marine mammal of the order Cetacea. For purposes of this subsection, polishing

or the adding of minor superficial markings does not constitute substantial etching, engraving, or carving.

(2) The Secretary, pursuant to the provisions of this subsection, may exempt, if such exemption is not in violation of the Convention, any pre-Act endangered species part from one or more of the following prohibitions:

(A) The prohibition on exportation from the United States set forth in section 1538(a)(1)(A) of this title.

(B) Any prohibition set forth in section 1538 (a)(1)(E) or (F) of this title.

(3) Any person seeking an exemption described in paragraph (2) of this subsection shall make application therefor to the Secretary in such form and manner as he shall prescribe, but no such application may be considered by the Secretary unless the application—

(A) is received by the Secretary before the close of the one-year period beginning on the date on which regulations promulgated by the Secretary to carry out this subsection first take effect;

(B) contains a complete and detailed inventory of all pre-Act endangered species parts for which the applicant seeks exemption;

(C) is accompanied by such documentation as the Secretary may require to prove that any endangered species part or product claimed by the applicant to be a pre-Act endangered species part is in fact such a part; and

(D) contains such other information as the Secretary deems necessary and appropriate to carry out the purposes of this subsection.

(4) If the Secretary approves any application for exemption made under this subsection, he shall issue to

the applicant a certificate of exemption which shall specify—

(A) any prohibition in section 1538(a) of this title which is exempted;

(B) the pre-Act endangered species parts to which the exemption applies;

(C) the period of time during which the exemption is in effect, but no exemption made under this subsection shall have force and effect after the close of the three-year period beginning on the date of issuance of the certificate unless such exemption is renewed under paragraph (8); and

(D) any term or condition prescribed pursuant to paragraph (5)(A) or (B), or both, which the Secretary deems necessary or appropriate.

(5) The Secretary shall prescribe such regulations as he deems necessary and appropriate to carry out the purposes of this subsection. Such regulations may set forth—

(A) terms and conditions which may be imposed on applicants for exemptions under this subsection (including, but not limited to, requirements that applicants register inventories, keep complete sales records, permit duly authorized agents of the Secretary to inspect such inventories and records, and periodically file appropriate reports with the Secretary); and

(B) terms and conditions which may be imposed on any subsequent purchaser of any pre-Act endangered species part covered by an exemption granted under this subsection;

to insure that any such part so exempted is adequately accounted for and not disposed of contrary to the provisions of this chapter. No regulation prescribed by the

Secretary to carry out the purposes of this subsection shall be subject to section 1533(f)(2)(A)(i) of this title.

(6)(A) Any contract for the sale of pre-Act endangered species parts which is entered into by the Administrator of General Services prior to the effective date of this subsection and pursuant to the notice published in the Federal Register on January 9, 1973, shall not be rendered invalid by virtue of the fact that fulfillment of such contract may be prohibited under section 1538(a)(1)(F) of this title.

(B) In the event that this paragraph is held invalid, the validity of the remainder of this chapter, including the remainder of this subsection, shall not be affected.

(7) Nothing in this subsection shall be construed to—

(A) exonerate any person from any act committed in violation of paragraphs (1)(A), (1)(E), or (1)(F) of section 1538(a) of this title prior to July 12, 1976; or

(B) immunize any person from prosecution for any such act.

(8)(A) Any person to whom a certificate of exemption has been issued under paragraph (4) of this subsection may apply to the Secretary for a renewal of such exemption for a period not to exceed three years beginning on the expiration date of such certificate. Such application shall be made in the same manner as the application for exemption was made under paragraph (3), but without regard to subparagraph (A) of such paragraph.

(B) If the Secretary approves any application for renewal of an exemption under this paragraph, he shall issue to the applicant a certificate of renewal of such exemption which shall provide that all terms, conditions, prohibitions, and other regulations made applicable by the original certificate shall remain in effect during the period of the renewal.

(C) No exemption or renewal of such exemption made under this subsection shall have force and effect after the expiration date of the certificate of renewal of such exemption issued under this paragraph.

(9) (A) The Secretary shall carry out a comprehensive review of the effectiveness of the regulations prescribed pursuant to paragraph (5) of this subsection—

(i) in insuring that pre-Act finished scrimshaw products, or the raw materials for such products, have been adequately accounted for and not disposed of contrary to the provisions of this chapter; and

(ii) in preventing the commingling of unlawfully imported or acquired marine mammal products with such exempted products either by persons to whom certificates of exemption have been issued under paragraph (4) of this subsection or by subsequent purchasers from such persons.

(B) In conducting the review required under subparagraph (A), the Secretary shall consider, but not be limited to—

(i) the adequacy of the reporting and records required of exemption holders;

(ii) the extent to which such reports and records are subject to verification;

(iii) methods for identifying individual pieces of scrimshaw products and raw materials and for preventing commingling of exempted materials from those not subject to such exemption; and

(iv) the retention of unworked materials in controlled access storage.

The Secretary shall submit a report of such review to the Committee on Merchant Marine and Fisheries of the House of Representatives and the Committee on the Environment and Public Works of the Senate and make it

available to the general public. Based on such review, the Secretary shall, on or before October 1, 1983, propose and adopt such revisions to such regulations as he deems necessary and appropriate to carry out this paragraph. Upon publication of such revised regulations, the Secretary may renew for a further period of not to exceed three years any certificate of exemption previously renewed under paragraph (8) of this subsection, subject to such new terms and conditions as are necessary and appropriate under the revised regulations; except that any certificate of exemption that would, but for this clause, expire on or after October 13, 1982, and before the date of the adoption of such regulations may be extended until such time after the date of adoption as may be necessary for purposes of applying such regulations to the certificate. Notwithstanding the foregoing, however, no person may, after January 31, 1984, sell or offer for sale in interstate or foreign commerce any pre-Act finished scrimshaw product unless such person has been issued a valid certificate of exemption by the Secretary under this subsection and unless such product or raw material for such product was held by such person on October 13, 1982.

(g) Burden of proof

In connection with any action alleging a violation of section 1538 of this title, any person claiming the benefit of any exemption or permit under this chapter shall have the burden of proving that the exemption or permit is applicable, has been granted, and was valid and in force at the time of the alleged violation.

(h) Certain antique articles; importation; port designation; application for return of articles

(1) Sections 1533(d) and 1538(a) and (c) of this title do not apply to any article which—

(A) is not less than 100 years of age;

(B) is composed in whole or in part of any endangered species or threatened species listed under section 1533 of this title;

(C) has not been repaired or modified with any part of any such species on or after December 28, 1973; and

(D) is entered at a port designated under paragraph (3).

(2) Any person who wishes to import an article under the exception provided by this subsection shall submit to the customs officer concerned at the time of entry of the article such documentation as the Secretary of the Treasury, after consultation with the Secretary of the Interior, shall by regulation require as being necessary to establish that the article meets the requirements set forth in paragraph (1)(A), (B), and (C).

(3) The Secretary of the Treasury, after consultation with the Secretary of the Interior, shall designate one port within each customs region at which articles described in paragraph (1)(A), (B), and (C) must be entered into the customs territory of the United States.

(4) Any person who imported, after December 27, 1973, and on or before November 10, 1978, any article described in paragraph (1) which—

(A) was not repaired or modified after the date of importation with any part of any endangered species or threatened species listed under section 1533 of this title;

(B) was forfeited to the United States before November 10, 1978, or is subject to forfeiture to the United States on such date of enactment, pursuant to the assessment of a civil penalty under section 1540 of this title; and

(C) is in the custody of the United States on November 10, 1978;

may, before the close of the one-year period beginning on November 10, 1978, make application to the Secretary for return of the article. Application shall be made in such form and manner, and contain such documentation, as the Secretary prescribes. If on the basis of any such application which is timely filed, the Secretary is satisfied that the requirements of this paragraph are met with respect to the article concerned, the Secretary shall return the article to the applicant and the importation of such article shall, on and after the date of return, be deemed to be a lawful importation under this chapter.

(i) Noncommercial transshipments

Any importation into the United States of fish or wildlife shall, if—

(1) such fish or wildlife was lawfully taken and exported from the country of origin and country of reexport, if any;

(2) such fish or wildlife is in transit or transshipment through any place subject to the jurisdiction of the United States en route to a country where such fish or wildlife may be lawfully imported and received;

(3) the exporter or owner of such fish or wildlife gave explicit instructions not to ship such fish or wildlife through any place subject to the jurisdiction of the United States, or did all that could have reasonably been done to prevent transshipment, and the circumstances leading to the transshipment were beyond the exporter's or owner's control;

(4) the applicable requirements of the Convention have been satisfied; and

(5) such importation is not made in the course of a commercial activity.

be an importation not in violation of any provision of this chapter or any regulation issued pursuant to this

chapter while such fish or wildlife remains in the control of the United States Customs Service.

(j) Experimental populations

(1) For purposes of this subsection, the term "experimental population" means any population (including any offspring arising solely therefrom) authorized by the Secretary for release under paragraph (2), but only when, and at such times as, the population is wholly separate geographically from nonexperimental populations of the same species.

(2)(A) The Secretary may authorize the release (and the related transportation) of any population (including eggs, propagules, or individuals) of an endangered species or a threatened species outside the current range of such species if the Secretary determines that such release will further the conservation of such species.

(B) Before authorizing the release of any population under subparagraph (A), the Secretary shall by regulation identify the population and determine, on the basis of the best available information, whether or not such population is essential to the continued existence of an endangered species or a threatened species.

(C) For the purposes of this chapter, each member of an experimental population shall be treated as a threatened species; except that—

> (i) solely for purposes of section 1536 of this title (other than subsection (a)(1) thereof), an experimental population determined under subparagraph (B) to be not essential to the continued existence of a species shall be treated, except when it occurs in an area within the National Wildlife Refuge System or the National Park System, as a species proposed to be listed under section 1533 of this title; and

(ii) critical habitat shall not be designated under this chapter for any experimental population determined under subparagraph (B) to be not essential to the continued existence of a species.

(3) The Secretary, with respect to populations of endangered species or threatened species that the Secretary authorized, before October 13, 1982, for release in geographical areas separate from the other populations of such species, shall determine by regulation which of such populations are an experimental population for the purposes of this subsection and whether or not each is essential to the continued existence of an endangered species or a threatened species.

(Pub. L. 93-205, § 10, Dec. 28, 1973, 87 Stat. 896; Pub. L. 94-359, §§ 2, 3, July 12, 1976, 90 Stat. 911, 912; Pub. L. 95-632, § 5, Nov. 10, 1978, 92 Stat. 3760; Pub. L. 96-159, § 7, Dec. 28, 1979, 93 Stat. 1230; Pub. L. 97-304, § 6(1)-(3), (4)(A), (5), (6), Oct. 13, 1982, 96 Stat. 1422-1424.)

§ 1540. Penalties and enforcement

(a) Civil penalties

(1) Any person who knowingly violates, and any person engaged in business as an importer or exporter of fish, wildlife, or plants who violates, any provision of this chapter, or any provision of any permit or certificate issued hereunder, or of any regulation issued in order to implement subsection (a)(1)(A), (B), (C), (D), (E), or (F), (a)(2)(A), (B), (C) or (D), (c), (d) (other than regulation relating to recordkeeping or filing of reports), (f) or (g) of section 1538 of this title, may be assessed a civil penalty by the Secretary of not more than $10,000 for each violation. Any person who knowingly violates, and any person engaged in business as an importer or exporter of fish, wildlife, or plants who violates, any provision of any other regulation issued

under this chapter may be assessed a civil penalty by the Secretary of not more than $5,000 for each such violation. Any person who otherwise violates any provision of this chapter, or any regulation, permit, or certificate issued hereunder, may be assessed a civil penalty by the Secretary of not more than $500 for each such violation. No penalty may be assessed under this subsection unless such person is given notice and opportunity for a hearing with respect to such violation. Each violation shall be a separate offense. Any such civil penalty may be remitted or mitigated by the Secretary. Upon any failure to pay a penalty assessed under this subsection, the Secretary may request the Attorney General to institute a civil action in a district court of the United States for any district in which such person is found, resides, or transacts business to collect the penalty and such court shall have jurisdiction to hear and decide any such action. The court shall hear such action on the record made before the Secretary and shall sustain his action if it is supported by substantial evidence on the record considered as a whole.

(2) Hearings held during proceedings for the assessment of civil penalties authorized by paragraph (1) of this subsection shall be conducted in accordance with section 554 of title 5 The Secretary may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and administer oaths. Witnesses summoned shall be paid the same fees and mileage that are paid to witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpena served upon any person pursuant to this paragraph, the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Secretary or to appear and produce documents before the Secretary, or

both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(3) Notwithstanding any other provision of this chapter, no civil penalty shall be imposed if it can be shown by a preponderance of the evidence that the defendant committed an act based on a good faith belief that he was acting to protect himself or herself, a member of his or her family, or any other individual from bodily harm, from any endangered or threatened species.

(b) Criminal violations

(1) Any person who knowingly violates any provision of this chapter, of any permit or certificate issued hereunder, or of any regulation issued in order to implement subsection (a)(1)(A), (B), (C), (D), (E), or (F), (a)(2)(A), (B), (C), or (D), (c) (d) (other than a regulation relating to recordkeeping, or filing of reports), (f), or (g) of section 1538 of this title shall, upon conviction, be fined not more than $20,000 or imprisoned for not more than one year, or both. Any person who knowingly violates any provision of any other regulation issued under this chapter shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than six months, or both.

(2) The head of any Federal agency which has issued a lease, license, permit, or other agreement authorizing a person to import or export fish, wildlife, or plants, or to operate a quarantine station for imported wildlife, or authorizing the use of Federal lands, including grazing of domestic livestock, to any person who is convicted of a criminal violation of this chapter or any regulation, permit, or certificate issued hereunder may immediately modify, suspend, or revoke each lease, license, permit, or other agreement. The Secretary shall also suspend for a period of up to one year, or cancel, any Federal hunting or fishing permits or stamps issued to any person who is convicted of a criminal violation of any provision of this

chapter or any regulation, permit, or certificate issued hereunder. The United States shall not be liable for the payments of any compensation, reimbursement, or damages in connection with the modification, suspension, or revocation of any leases, licenses, permits, stamps, or other agreements pursuant to this section.

(3) Notwithstanding any other provision of this chapter, it shall be a defense to prosecution under this subsection if the defendant committed the offense based on a good faith belief that he was acting to protect himself or herself, a member of his or her family, or any other individual, from bodily harm from any endangered or threatened species.

(c) District court jurisdiction

The several district courts of the United States, including the courts enumerated in section 460 of title 28, shall have jurisdiction over any actions arising under this chapter. For the purpose of this chapter, American Samoa shall be included within the judicial district of the District Court of the United States for the District of Hawaii.

(d) Rewards

The Secretary or the Secretary of the Treasury shall pay a reward from sums received as penalties, fines, or forfeitures of property for any violation of this chapter or any regulation issued hereunder to any person who furnishes information which leads to an arrest, a criminal conviction, civil penalty assessment, or forfeiture of property for any violation of this chapter or any regulation issued hereunder. The amount of the reward, if any, is to be designated by the Secretary or the Secretary of the Treasury, as appropriate. Any officer or employee of the United States or any State or local government who furnishes information or renders service in the perform-

ance of his official duties is ineligible for payment under this subsection.

(e) Enforcement

(1) The provisions of this chapter and any regulations or permits issued pursuant thereto shall be enforced by the Secretary, the Secretary of the Treasury, or the Secretary of the Department in which the Coast Guard is operating, or all such Secretaries. Each such Secretary may utilize by agreement, with or without reimbursement, the personnel, services, and facilities of any other Federal agency or any State agency for purposes of enforcing this chapter.

(2) The judges of the district courts of the United States and the United States magistrates may, within their respective jurisdictions, upon proper oath or affirmation showing probable cause, issue such warrants or other process as may be required for enforcement of this chapter and any regulation issued thereunder.

(3) Any person authorized by the Secretary, the Secretary of the Treasury, or the Secretary of the Department in which the Coast Guard is operating, to enforce this chapter may detain for inspection and inspect any package, crate, or other container, including its contents, and all accompanying documents, upon importation or exportation. Such person may make arrests without a warrant for any violation of this chapter if he has reasonable grounds to believe that the person to be arrested is committing the violation in his presence or view, and may execute and serve any arrest warrant, search warrant, or other warrant or civil or criminal process issued by any officer or court of competent jurisdiction for enforcement of this chapter. Such person so authorized may search and seize, with or without a warrant, as authorized by law. Any fish, wildlife, property, or item so seized shall be held by any person authorized by the

Secretary, the Secretary of the Treasury, or the Secretary of the Department in which the Coast Guard is operating pending disposition of civil or criminal proceedings, or the institution of an action in rem for forfeiture of such fish, wildlife, property, or item pursuant to paragraph (4) of this subsection; except that the Secretary may, in lieu of holding such fish, wildlife, property, or item, permit the owner or consignee to post a bond or other surety satisfactory to the Secretary, but upon forfeiture of any such property to the United States, or the abandonment or waiver of any claim to any such property, it shall be disposed of (other than by sale to the general public) by the Secretary in such a manner, consistent with the purposes of this chapter, as the Secretary shall by regulation prescribe.

(4) (A) All fish or wildlife or plants taken possessed, sold, purchased, offered for sale or purchase, transported, delivered, received, carried, shipped, exported, or imported contrary to the provisions of this chapter, any regulation made pursuant thereto, or any permit or certificate issued hereunder shall be subject to forfeiture to the United States.

(B) All guns, traps, nets, and other equipment, vessels, vehicles, aircraft, and other means of transportation used to aid the taking, possessing, selling, purchasing, offering for sale or purchase, transporting, delivering, receiving, carrying, shipping, exporting, or importing of any fish or wildlife or plants in violation of this chapter, any regulation made pursuant thereto, of any permit or certificate issued thereunder shall be subject to forfeiture to the United States upon conviction of a criminal violation pursuant to subsection (b) (1) of this section.

(5) All provisions of law relating to the seizure, forfeiture, and condemnation of a vessel for violation of the customs laws, the disposition of such vessel or the pro-

ceeds from the sale thereof, and the remission or mitigation of such forfeiture, shall apply to the seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this chapter, insofar as such provisions of law are applicable and not inconsistent with the provisions of this chapter; except that all powers, rights, and duties conferred or imposed by the customs laws upon any officer or employee of the Treasury Department shall, for the purposes of this chapter, be exercised or performed by the Secretary or by such persons as he may designate.

(6) The Attorney General of the United States may seek to enjoin any person who is alleged to be in violation of any provision of this chapter or regulation issued under authority thereof.

(f) Regulations

The Secretary, the Secretary of the Treasury, and the Secretary of the Department in which the Coast Guard is operating, are authorized to promulgate such regulations as may be appropriate to enforce this chapter, and charge reasonable fees for expenses to the Government connected with permits or certificates authorized by this chapter including processing applications and reasonable inspections, and with the transfer, board, handling, or storage of fish or wildlife or plants and evidentiary items seized and forfeited under this chapter. All such fees collected pursuant to this subsection shall be deposited in the Treasury to the credit of the appropriation which is current and chargeable for the cost of furnishing the services. Appropriated funds may be expended pending reimbursement from parties in interest.

(g) Citizen suits

(1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf—

(A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof; or

(B) to compel the Secretary to apply, pursuant to section 1535(g)(2)(B)(ii) of this title, the prohibitions set forth in or authorized pursuant to section 1533(d) or 1538(a)(1)(B) of this title with respect to the taking of any resident endangered species or threatened species within any State; or

(C) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any such provision or regulation, or to order the Secretary to perform such act or duty, as the case may be. In any civil suit commenced under subparagraph (B) the district court shall compel the Secretary to apply the prohibition sought if the court finds that the allegation that an emergency exists is supported by substantial evidence.

(2)(A) No action may be commenced under subparagraph (1)(A) of this section—

(i) prior to sixty days after written notice of the violation has been given to the Secretary, and to any alleged violator of any such provision or regulation;

(ii) if the Secretary has commenced action to impose a penalty pursuant to subsection (a) of this section; or

(iii) if the United States has commenced and is diligently prosecuting a criminal action in a court of

the United States or a State to redress a violation of any such provision or regulation.

(B) No action may be commenced under subparagraph (1)(B) of this section—

(i) prior to sixty days after written notice has been given to the Secretary setting forth the reasons why an emergency is thought to exist with respect to an endangered species or a threatened species in the State concerned; or

(ii) if the Secretary has commenced and is diligently prosecuting action under section 1535(g)(2)(B)(ii) of this title to determine whether any such emergency exists.

(C) No action may be commenced under subparagraph (1)(C) of this section prior to sixty days after written notice has been given to the Secretary; except that such action may be brought immediately after such notification in the case of an action under this section respecting an emergency posing a significant risk to the well-being of any species of fish or wildlife or plants.

(3)(A) Any suit under this subsection may be brought in the judicial district in which the violation occurs.

(B) In any such suit under this subsection in which the United States is not a party, the Attorney General, at the request of the Secretary, may intervene on behalf of the United States as a matter of right.

(4) The court, in issuing any final order in any suit brought pursuant to paragraph (1) of this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

(5) The injunctive relief provided by this subsection shall not restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or limitation or to seek

any other relief (including relief against the Secretary or a State agency).

(h) Coordination with other laws

The Secretary of Agriculture and the Secretary shall provide for appropriate coordination of the administration of this chapter with the administration of the animal quarantine laws (21 U.S.C. 101-105, 111-135b, and 612-614) and section 306 of the Tariff Act of 1930 (19 U.S.C. 1306). Nothing in this chapter or any amendment made by this chapter shall be construed as superseding or limiting in any manner the functions of the Secretary of Agriculture under any other law relating to prohibited or restricted importations or possession of animals and other articles and no proceeding or determination under this chapter shall preclude any proceeding or be considered determinative of any issue of fact or law in any proceeding under any Act administered by the Secretary of Agriculture. Nothing in this chapter shall be construed as superseding or limiting in any manner the functions and responsibilities of the Secretary of the Treasury under the Tariff Act of 1930 [19 U.S.C. 1202 et seq.], including, without limitation, section 527 of that Act (19 U.S.C. 1527), relating to the importation of wildlife taken, killed, possessed, or exported to the United States in violation of the laws or regulations of a foreign country.

(Pub. L. 93-205, § 11, Dec. 28, 1973, 87 Stat. 897; Pub. L. 94-359, § 4; July 12, 1976, 90 Stat. 913; Pub. L. 95-632, §§ 6-8, Nov. 10, 1978, 92 Stat. 3761, 3762; Pub. L. 97-79, § 9(e), Nov. 16, 1981, 95 Stat. 1079; Pub. L. 97-304, §§ 7, 9(c), Oct. 13, 1982, 96 Stat. 1425, 1427.)

§ 1541. Endangered plants

The Secretary of the Smithsonian Institution, in conjunction with other affected agencies, is authorized and directed to review (1) species of plants which are now or

may become endangered or threatened and (2) methods of adequately conserving such species, and to report to Congress, within one year after December 28, 1973, the results of such review including recommendations for new legislation or the amendment of existing legislation.

(Pub. L. 93-205, § 12, Dec. 28, 1973, 87 Stat. 901.)

§ 1542. Authorization of appropriations

(a) In general

Except as provided in subsections (b), (c), and (d) of this section, there are authorized to be appropriated—

(1) not to exceed $27,000,000 for each of fiscal years 1983, 1984, and 1985 to enable the Department of the Interior to carry out such functions and responsibilities as it may have been given under this chapter;

(2) not to exceed $3,500,000 for each of fiscal years 1983, 1984, and 1985 to enable the Department of Commerce to carry out such functions and responsibilities as it may have been given under this chapter; and

(3) not to exceed $1,850,000 for each of fiscal years 1983, 1984, and 1985 to enable the Department of Agriculture to carry out its functions and responsibilities with respect to the enforcement of this chapter and the Convention which pertain to the importation or exportation of plants.

(b) Cooperation with States

For the purposes of section 1535 of this title, there are authorized to be appropriated not to exceed $6,000,000 for each of fiscal years 1983, 1984, and 1985.

(c) Exemptions

There are authorized to be appropriated to the Secretary to assist him and the Endangered Species Committee

in carrying out their functions under section 1536(e), (g), and (h) of this title not to exceed $600,000 for each of fiscal years 1983, 1984, and 1985.

(d) Convention implementation

There are authorized to be appropriated to the Department of the Interior for purposes of carrying out section 1537a(e) of this title not to exceed $150,000 for each of fiscal years 1983 and 1984, and not to exceed $300,000 for fiscal year 1985, and such sums shall remain available until expended.

(Pub. L. 93-205, § 15, Dec. 28, 1973, 87 Stat. 903; Pub. L. 94-325, June 30, 1976, 90 Stat. 724; Pub. L. 95-632, § 9, Nov. 10, 1978, 92 Stat. 3762; Pub. L. 96-159, § 8, Dec. 28, 1979, 93 Stat. 1230; Pub. L. 97-304, § 8(a), Oct. 13, 1982, 96 Stat. 1425.)

§ 1543. Construction with Marine Mammal Protection Act of 1972

Except as otherwise provided in this chapter, no provision of this chapter shall take precedence over any more restrictive conflicting provision of the Marine Mammal Protection Act of 1972 [16 U.S.C. 1361 et seq.].

(Pub. L. 93-205, § 17, Dec. 28, 1973, 87 Stat. 903.)

APPENDIX J

WASHOE PROJECT, NEVADA-CALIFORNIA

§ 614. Authorization for construction, operation and maintenance

For the purposes of furnishing water for the irrigation of approximately fifty thousand acres of land in the Carson and Truckee River Basins, Nevada and California, providing drainage service to approximately thirty-one thousand acres of land therein, firming the existing water supplies of lands under the Truckee River storage project and the Newlands project, controlling floods, providing hydroelectric power, development of fish and wildlife resources, and for other beneficial purposes, the Secretary of the Interior is authorized to construct, operate, and maintain the Washoe reclamation project consisting of two principal reservoirs at the Stampede and Watasheamu sites, together with other necessary works for the impounding, diversion, and the delivery of water, the generation and transmission of hydroelectric power, and the drainage of lands. The dam at the Stampede site shall be so constructed as to permit its ultimate enlargement to a height at which the reservoir will have a capacity of approximately one hundred and seventy-five thousand acre-feet. Aug. 1, 1956, c. 809, § 1, 70 Stat. 775.

§ 614a. Law governing; repayment of construction costs; contracts for supplemental water supply; net revenues from sale of commercial power; Alpine County water users; waters of Little Truckee River

(a) In constructing, operating, and maintaining the works authorized in section 614 of this title, the Secretary shall be governed by the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 389, and Acts amendatory thereof or supplementary thereto) except as is otherwise provided in sections 614-614d of this title.

(b) Any contract entered into under section 485h(d) of this title for payment of those portions of the costs of constructing, operating, and maintaining the Washoe reclamation project which are properly allocable to irrigation and drainage and which are assigned to be paid by the contracting organization may provide for the repayment of the portion of the construction cost of the project assigned to any project contract unit or, if the contract unit be divided into two or more irrigation or drainage blocks, to any such block over a period of not more than fifty years, exclusive of any permissible development period, or as near thereto as is consistent with the adoption and operation of a variable payment formula which, being based on full repayment within the period stated under normal conditions, permits variance in the required annual payments in the light of economic factors pertinent to the ability of the organization to pay: *Provided*, That any contract for a supplemental water supply for irrigation under sections 614-614d of this title may omit provisions complying with the third sentence of section 423e of this title if such contract, in lieu of such provisions, provides that the pro rata share of the irrigation allocation which is attributable to furnishing irrigation benefits, in each particular year, to land held in private ownership by any one owner in excess of one hundred and sixty irrigated acres, shall be returned with interest determined in accordance with subsection (c) of this section, except that such payment for the excess lands shall not exceed an amount equal to the increased payment capacity of the excess lands, as determined by the Secretary of the Interior, resulting from the supplemental water supply.

(c) Notwithstanding any other provision of law to the contrary, all net revenues derived from the sale of commercial power from the Washoe reclamation project shall be applied, first, to the amortization of that portion of the cost of constructing the project which is allocated to commercial power with interest on the unamortized bal-

ance thereof at the average rate (which rate shall be certified by the Secretary of the Treasury) paid by the United States on its marketable long-term securities outstanding on August 1, 1956, and thereafter to the amortization of that portion of the cost of constructing the project which is allocated to irrigation but which is beyond the ability of the contracting irrigation organizations to repay as provided above, including interest that would have been paid by the irrigators on that portion of the irrigation allocation attributable to furnishing irrigation benefits to excess lands which is not repaid under subsection (b) of this section: *Provided*, That the Secretary, prior to the delivery of project water supplies, shall have entered into a contract or contracts with an organization or organizations as defined in section 485a(g) of this title which have the capacity to levy assessments upon all taxable real property located within their boundaries to assist in making repayments.

(d) Water users in Alpine County, California, shall have the opportunity to contract for project water made available by the Watasheamu Reservoir before such project water is offered for the development of any new land in Nevada. Should any such project water be contracted for by Alpine County water users, then in that event such users shall be permitted to exchange such water for existing rights to natural flow or stored water of the West Carson River.

(e) The use of waters of the Little Truckee River solely for the generation of electric power by the Washoe project shall not impair or preclude the appropriation of such waters in the future for beneficial consumptive use within the Little Truckee River watershed in California to the same extent as such waters may be presently available for such appropriation in the State of California: *Provided*, That if and when an interstate compact covering the distribution and use of the waters of the Truckee and Carson Rivers is approved by the Legislatures of the

States of California and Nevada and is consented to by Congress, the operation of the Washoe reclamation project shall be in conformance with such compact, and the foregoing restriction shall not apply. Aug. 1, 1956, c. 809, § 2, 70 Stat. 775.

§ 614b. Facilities for access, public health and safety, and protection of public property; withdrawal of lands from entry; nonreimbursable costs

The Secretary is authorized to investigate, plan, construct, operate, and maintain minimum basic facilities for access to, and for the maintenance of public health and safety and the protection of public property on, lands withdrawn or acquired for the development of the Washoe project, to conserve the scenery and natural, historic, and archeologic objects, and to provide for public use and enjoyment of the same and of the water areas created by this project by such means as are consistent with its primary purposes. The Secretary is authorized to withdraw from entry or other disposition under the public land laws such public lands as are necessary for the construction, operation, and maintenance of said minimum basic facilities and for the other purposes specified in this section and to dispose of such lands to Federal, State, and local governmental agencies by lease, transfer, exchange, or conveyance upon such terms and conditions as will best promote their development and operation in the public interest. The Secretary is further authorized to investigate the need for acquiring other lands for said purposes and to report thereon to the Committees on Interior and Insular Affairs of the Senate and House of Representatives, but no lands shall be acquired solely for any of these purposes other than access to project lands and the maintenance of public health and safety and the protection of public property thereon without further authorization by the Congress. All costs incurred pursuant to this section shall be nonreimbursable and nonreturnable. Aug. 1 1956, c. 809, § 3, 70 Stat. 776.

§ 614c. Facilities for development of fish and wildlife resources; minimum water releases; cost

Facilities shall be provided for the development of the fish and wildlife resources of the project area including facilities to permit increased minimum water releases from Lake Tahoe and restoration of the Pyramid Lake fishery. The cost of such facilities, including operation and maintenance, shall be nonreimbursable. The cost to the Federal Government of constructing these facilities shall not exceed $2,000,000. This amount shall not include the cost of measures undertaken, pursuant to section 662 of Title 16, to mitigate damages to fish and wildlife resources occasioned by the Washoe project as authorized by section 614 of this title. Aug. 1, 1956, c. 809, § 4, 70 Stat. 777.

§ 614d. Authorization of appropriations

There is authorized to be appropriated for construction of the Washoe reclamation project the sum of $52,000,000 (April 1958 prices) plus such amounts, if any, as may be required by reason of changes in construction costs as indicated by engineering costs indices applicable to the types of construction involved therein and, in addition thereto, such sums as may be required to operate and maintain the project: *Provided*, That the appropriation of funds for the construction, operation, or maintenance of facilities authorized by section 614c of this title shall not be from the reclamation fund. Aug. 1, 1956, c. 809, § 5, 70 Stat. 777; Aug. 21, 1958, Pub. L. 85-706, 72 Stat. 705.

APPENDIX K

Alamogordo Dam & Reservoir, Carlsbad Project, ch. 699, 53 Stat. 1414, 1417, (1939) (codified at 33 U.S.C. § 707).

Hungry Horse Dam, South Fork of the Flathead River, Flathead County, Montana, ch. 234, 58 Stat. 270, (1944) (codified at 43 U.S.C. § 593a).

Lewiston Orchards Project, Idaho, ch. 706, 60 Stat. 717 (1946).

Paonia Project, Colorado, ch. 148, 61 Stat. 181 (1947).

Preston Bench Project, Idaho, ch. 470, 62 Stat. 442 (1948).

Weber Basin Project, Utah, ch. 519, 63 Stat. 677 (1949).

American River Basin Development, California, ch. 690, 630 Stat. 852 (1949).

Palisades Dam and Reservoir Project, Idaho, ch. 1114, 64 Stat. 1083 (1950).

Collbran Project, Colorado, ch. 565, 66 Stat. 325 (1952).

Glendo Unit (Wyoming), Missouri River Basin Project, ch. 532, 68 Stat. 486 (1954).

Foster Creek Division, Chief Joseph Dam Project, Washington, ch. 585, 68 Stat. 568 (1954).

Talent Division, Rogue River Basin Project, Oregon, ch. 775, 68 Stat. 752 (1954).

Ainsworth, Lavaca Flats, Mirage Flats Extension, and O'Neil Units, Missouri River Basin Project, ch. 781, 68 Stat. 757 (1954).

Michaud Flats Project, Idaho, ch. 1159, 68 Stat. 1026 (1954).

Trinity River Division, Central Valley Project, California, ch. 872, 69 Stat. 719 (1955).

Juniper Division, Wapinitia Project, Oregon, ch. 360, 70 Stat. 244 (1956).

Farwell Unit, Missouri River Basin Project, Nebraska, ch. 923, 70 Stat. 975 (1956).

Crooked River Project, Oregon, ch. 980, 70 Stat. 1058 (1956) (codified at 43 U.S.C. § 615f).

Red Willow Dam and Reservoir, Nebraska, Pub. L. No. 85-783, 72 Stat. 937 (1958).

Spokane Valley Project, Washington and Idaho, Pub. L. No. 86-276, 73 Stat. 561 (1959).

Western Division, The Dalles Project, Oregon, Pub. L. No. 86-745, 74 Stat. 882 (1960).

Mann Creek Project, Idaho, Pub. L. No. 87-589, 76 Stat. 388 (1962) (codified at 43 U.S.C. §§ 616g-616j).

Fryingpan-Arkansas Project, Colorado, Pub. L. No. 87-590, 76 Stat. 389 (1962).

Upper Division, Baker Project, Oregon, Pub. L. No. 87-706, 76 Stat. 634 (1962).

Dixie Project, Utah, Pub. L. No. 88-565, 78 Stat. 848 (1964).

Manson Unit, Chief Joseph Dam Project, Washington, Pub. L. No. 89-557, 80 Stat. 704 (1966) (codified at 43 U.S.C. §§ 616vv-1—616vv-5).

Tualatin Project, Oregon, Pub. L. No. 89-596, 80 Stat. 822 (1966) (codified at 43 U.S.C. §§ 616nnn-616sss).